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CONTENTS.

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The incomes of United States district attorneys as well as marshals and clerks of federal courts will be materially reduced if the bill recommended by the house committee on the judiciary shall be favorably acted upon. Under the present system of graded fees, says a report of that committee, a premium is placed upon prosecutions. During the fiscal year 1893, 10,867 prosecutions were instituted for violations of United States laws, which resulted in 5,262 convictions and 1,660 acquittals, while 3,953 of the cases were nolle prossed. The report continues: "We are justified in presuming that where the defendant is acquitted or the case against him nolle prossed the United States had not sufficient evidence to convict. We are led to conclude, therefore, that more than half of the cases terminating during that fiscal year were improperly brought. Of course, there are many criminal cases properly brought which result in acquittals or nolle prosses, but in the above showing the percentage of acquittals and nolle prosses is too large, and we think justifies the belief that many of them were instituted more for the purpose of making fees than in the interest of justice. And when we come to consider that it costs the government as much for jurors and witnesses in cases of acquittals as of convictions, we naturally conclude that if we can diminish the number of cases in the courts that are not sufficiently supported by the evidence we can save a great deal of expense to the United States." The salaries proposed in the bill are $4,000 to district attorneys, $4,000 for marshals and graded salaries for clerks. The view of the committee, from the standpoint of economy is not the only one in which the matter should be regarded. The disposition to institute prosecutions for the sake of the fees frequently causes irreparable damage to innocent parties and places the federal government in the attitude of persecuting rather than prosecuting.

The opinion of the United States Circuit Court of Appeals at St. Paul in the case of

Vol. 38—No. 22.

the Chicago, Milwaukee and St. Paul R. R. Co. v. The Wabash, St. Louis & Pacific Ry. Co., involving the validity of a contract for pooling by railroad companies, is of considerable importance. The suit was brought to compel the payment of over $18,000 under a contract for the pooling of traffic entered into in 1883 by seven railroad companies, among whom the parties to the suit were included. The contract was to continue for twenty-five years, and under it the pooling and division of traffic intended were to be accomplished, so far as might be, by a physical division of the traffic itself between the companies in certain fixed proportions, and where this was not or could not be done it was to be accomplished by pooling and division of the gross earnings of such traffic between the companies in such fixed proportions. As a matter of fact, in the course of business under the contract the traffic involved was not actually divided between and carried by the companies in the proportions fixed, but the Wabash, St. Louis & Pacific Railway Company, among others, actually carried more than the share allotted to it, and the Chicago, Milwaukee & St. Paul Railway, among others, actually carried less. The pool commissioner provided for by the contracts ascertained and made a statement of the differences, and in adjusting them directed that the Wabash receivers should pay to the Chicago, Milwaukee & St. Paul Company a sum which, after deducting admitted credits, amounted to $18,404.40. This was the sum which the latter company sued to recover.

The Wabash road set up the defense that the contract upon which the claim was based was against public policy and void. This defense was sustained in the United States Circuit Court, and the case was thereupon appealed to the United States Circuit Court of Appeals, which has affirmed the decision of the lower court. In passing upon the contract the Appellate Court, speaking through Judge Caldwell, says: "Its object was not to avoid ruinous competition by entering into an arrangement to carry freight at reasonable rates, but its evident purpose was to stifle all competition for the purpose of raising rates. By the terms of the contract all of the roads are to be operated, as to through traffic, as they should be if operated by one

corporation which owned all of them. These seven corporations were made one company so far as concerned their relations with each other, with rival carriers and with the public. Between them there could be no competition or freedom of action. To the extent of the traffic covered by this contract, and it covered no inconsiderable portion of the traffic of the continent, each company practically abdicated its functions as a common carrier and conferred them on a new creation for the sole purpose of suppressing competition. The contract removed every incentive to the companies to afford the proper facilities and to carry at reasonable rates, for under its provisions a company is entitled to its full percentage of gross earnings even though it does not carry a pound of freight." The court laid down the doctrine that a railroad corporation is a *quasi*-public corporation, and owes certain duties to the public, among which are the duty to afford reasonable facilities for the transportation of persons and property, and to charge only reasonable rates for such service, and that any contract by which it disables itself from performing these duties, or which makes it to its interest not to perform them, or removes all incentive to their performance, is contrary to public policy and void.

NOTES OF RECENT DECISIONS.

NEGLIGENCE — DANGEROUS UNGUARDED SLACK PILE OF COAL MINE—CONTRIBUTORY NEGLIGENCE OF CHILD.—In Union Pac. Ry. Co. v. McDonald, 14 S. C. Rep. 619, before the Supreme Court of the United States, it appeared that a railroad company—operating, near its depot, at a village, a coal mine, the usual approach to which was a narrow path extending from the depot across the railroad tracks, and close to a long trench beside them—deposited in the trench a large quantity of coal slack, piling it up level with the bank, so that it took fire by spontaneous combustion, and burned continuously below the surface, the burning coals being concealed by a slight covering of dead ashes. Children, as well as others, were permitted to visit the mine, and were in the habit of playing in the vicinity of the slack. It was held that the company, in leaving the pit unguarded, with knowledge of the facts, was guilty of negligence rendering it liable for injuries to a boy 12 years of age, caused by his falling into the pit while visiting the mine from curiosity, without knowledge of the danger, or negligence on his part. The boy so injured had been frightened by the threatening outcries and conduct of several boys coming from the mine, to escape from whom he ran towards the village by the only path open, along the slack pit, into which he fell, in attempting to pass persons on the bank. It was held, that he was not chargeable with negligence, in so falling. 42 Fed. Rep. 579, affirmed. The mother of the boy had consented to his visiting the mine, in company with a "trapper" boy of the village. It was held, that this could not be imputed to him, as negligence; both he and his mother being ignorant of the concealed danger, and the trapper being, presumably, capable of caring for him. Failure of a company operating a coal mine to fence its slack pile as required by a statute (Act Colo. May 3, 1877), primarily intended for the protection of cattle, being a breach of duty to the public, is evidence of negligence, for which the company is liable, where personal injuries are, in a substantial sense, the result of such violation of duty. 42 Fed. Rep. 579, affirmed.

TRUSTS — RIGHTS OF BENEFICIARIES—BEQUEST OF CORPORATE STOCK.—In Thomas v. Gregg, 28 Atl. Rep. 565, decided by the Court of Appeals of Maryland, testator bequeathed in trust, for the use of his daughters for life, stock in a company which thereafter passed a resolution reciting that, for three years ending September, 1891, the net earnings had amounted to a specified sum, that they had been applied to the improvement of the company's property, and that therefore a dividend of 20 per cent. be declared for such period, "payable in common stock of the company:" Held, that the dividend was income and not capital, and that the daughters were entitled to that earned after testator's death. Boyd, J., says in part:

As so many different views have been expressed by the courts in passing upon the respective rights of tenants for life and remainder-men in regard to what are commonly called "stock dividends," it will be well to refer to some of the leading cases. In Minot v. Paine, 99 Mass. 101, what is sometimes called "the Massachusetts rule" was adopted, viz. "to regard cash dividends, however large, as income, and stock

dividends, however made, as capital." The court said that the trustee needed some plain principles to guide him, and deemed the above rule simple and equitable, as well as in conformity with the prior decisions of that court. In that case the court held that the distribution of stock of a railroad company to represent improvements on the road, construction of a bridge, etc., although admitted to have been made from the net earnings of the company, should be treated as capital, and not as income, and hence should be held by the trustees, and not delivered to the life tenant. Regular cash dividends had been paid semi-annually on the stock, This rule has not been altogether acceptable, and has been somewhat qualified or modified by subsequent cases in that State, although the general principle, as settled in Minot v. Paine, is still maintained. In Daland v. Williams, 101 Mass. 571, the directors, having voted to increase the capital stock by 3,000 shares, declared a cash dividend of 40 per cent., and authorized the treasurer to receive that dividend in payment for 2,800 shares, the remaining 200 shares to be sold. The court held that the transaction was virtually a stock dividend, and that the shares must go to the remainder-man's fund. In Leland v. Hayden, 102 Mass. 542, where the company had invested its surplus earnings in its own stock, and subsequently declared a dividend of that stock, the life tenant was held entitled to it. The Massachusetts court, in these later cases, determined that they can, in deciding whether in a given case the distribution is a stock or cash dividend, consider the actual and substantial character of the transaction and not its nominal character merely. See, also, Rand v. Hubbell, 115 Mass. 461; Heard v. Eldredge, 109 Mass. 258; Davis v. Jackson, 152 Mass. 58, 25 N. E. Rep. 21. In Rand v. Hubbell, Gray, C. J., in speaking of the earnings of a corporation, said: "When a distribution of said earnings is made by the corporation among its shareholders, the question whether such distribution is an apportionment of additional stock, or a division of profits, depends upon the subtance and intent of the action of the corporation, as shown by its votes." In the case of Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. Rep. 1057, Justice Gray uses very much the same language, adding that "ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income, of each share." The court decided that the new shares issued in that case were capital. The company had paid money dividends from time to time, and had invested portions of its net earnings, incomes, and profits in the enlargement of its plant, so that its construction account exceeded $1,000,000, being double the capital stock. The capital was increased to $1,000,000 and, by resolution of the directors, the increased stock was awarded to the shareholders, share for share. The greater part of the investments was made prior to the beginning of the life tenancy, although the construction account was increased between $100,000 and $200,000 afterwards. The court practically adopted the Massachusetts rule, qualified as above stated, and decided that the new stock was capital. In Connecticut and Rhode Island, dividends of new shares, representing accumulated earnings, are held to be capital, and not income. Brinley v. Grou, 50 Conn. 66; Brown's Petition, 14 R.I. 371. In Richardson v. Richardson, 75 Me. 570, the court said: "The decided preponderance of authority probably concedes the point that dividends of stock go to the capital under all ordinary circumstances." In Georgia, the Code is construed so as to follow the Massachusetts rule. Millen v. Guerrand, 67 Ga. 284. In England, there have been a number of decisions on this question, and they are somewhat conflicting. The earlier cases decided that an ordinary, regular, and usual dividend, whether it be cash, stock, or property, belonged to the life tenant, and that an extraordinary dividend belonged to the *corpus*. In the later cases the courts have examined into the real nature of the transaction to ascertain the intention of the company. In the case of Bouch v. Sproule, 12 App. Cas. 385, where the early English cases are reviewed, Lord Herschel quoted with approval the principle expressed by Lord Justice Frey: "When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power, either of distributing its profits as dividend, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested, under the testator or settlor, in the shares, and, consequently, what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, inures to the benefit of all who are interested in the capital." That expression is also quoted by Justice Gray in 136 U. S. 10 Sup. Ct. Rep., *supra*. In Pennsylvania, there have been a number of decisions, beginning with Earp's Appeal, 28 Pa. St. 368. In that case a testator left the residue of his estate to his executors in trust, to collect the rents, income, and interest, and to pay one equal fourth part to and for the use of each of his four children during their natural lives, etc. Among the residuary estate was stock in a manufacturing company upon which large surplus profits, over and above the current dividends, had accumulated and continued to accumulate for several years after the death of the testator. With the consent of the executors and the legatees, the capital stock of the company was increased, and new stock distributed among the stockholders in proportion to the stock held by them; the surplus earnings or profits being applied to the payment of such increased shares of stock. It was held that so much of the surplus earnings as accumulated before the death of the testator was principal, and subject to the trust, and that the accumulations after the death of the testator were as much a part of the income of the principal as the current dividends, and as such belonged to the legatees of the income for life. The court decided that the surplus earnings could be apportioned, so as to credit the capital with such as had accumulated prior to the death of the testator, and to give to the life tenant those earnings that had accumulated after the testator's death. This case has been followed in Pennsylvania in a number of cases. See Wiltbank's Appeal, 64 Pa. St. 256; Moss' Appeal, 83 Pa. St. 264; Biddle's Appeal, 99 Pa. St. 278; Vinton's Appeal, *Id.* 434; and Smith's Appeal, 140 Pa. St. 544, 21 Atl. Rep. 441. Different results were reached in these cases, but the principles settled in Earp's Appeal were affirmed. Justice Paxson, in Moss' Appeal, after referring to the general rule that nothing earned by a corporation can be regarded as profits until it shall have been declared so by the directors, and that the stockholders have no right to claim earnings until the corporation decides to distribute them as profits, said: "But where a corporation having actually made profits, proceeds to distribute such profits amongst the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction. Equity, which disregards form and grasps the substance, would award the thing distributed, whether stock or moneys, to whomsoever was entitled to the profits."

In Van Doren v. Olden, 19 N. J. Eq. 176, the chancellor reviewed the early English cases, declined to follow them, and said: "Chief Justice Lewis, in Earp's Appeal, 28 Pa. St. 368, considered the whole matter fully, and settled the law in Pennsylvania on this subject, in an opinion prepared with great ability, on what appears to me to be the correct principles to be applied in all such cases." See, also, Ashhurst v. Field, 26 N. J. Eq. 1. In Lord v. Brooks, 52 N. H. 72, the court follows Earp's Appeal, and says that "the reasoning in Minot v. Paine, is unsatisfactory to us." The case of Hite v. Hite (Ky.), 20 S. W. Rep. 779, decides that "where a dividend, although declared in stock, is based upon the earnings of the company, it is, in reality, whether called by one name or another, the income of the capital invested in it. It is but a mode of distributing the profits." The early New York cases are to the same effect as Earp's Appeal. Clarkson v. Clarkson, 18 Barb. 646; Simpson v. Moore, 30 Barb. 637; Goldsmith v. Swift, 25 Hun, 201. But they are not decisions of the highest court in that State, which, in Riggs v. Cragg, 89 N. Y. 479, declined to pass upon the question, as it was not necessary to decide it. Several of the late text-books have adopted the Pennsylvania rule as the correct one, and some of them speak of it as the American rule, although they are not correct in stating that this rule prevails in every State but Massachusetts and Georgia. Cook, Stock & S. § 554, note; Beach, Priv. Corp. § 600.

It will be seen, from an examination of the above authorities, that they differ very materially as to the proper rule to be established on the main question, as well as on minor matters. But there are some principles involved in the question concerning which most of the courts are in accord. It is generally admitted, by those courts which are ordinarily inclined to hold stock dividends to be capital, that there may be cases in which they should be held to be income; depending "upon the substance and intent of the action of the corporation, as manifested by its vote or resolution," as was said in 136 U. S. 559, 10 Sup. Ct. Rep. 1057. There are but few cases, if any, that can properly be construed to mean that, although the stock dividends only included net earnings, and they were intended to be distributed as income, and not as capital, yet the life tenants must be deprived of them, simply because they were stock dividends. When it is possible for the court to ascertain to any certainty whether the distribution in the stock dividend includes net earnings, and, if so, what proportion, and also whether such earnings were intended to be made a part of the capital, or merely to be used temporarily, with the intention on the part of the directors of refunding them to the shareholders as income, we think it is the duty of the court to make such investigations and dispose of the stock in an equitable way between the tenants for life and the remainder-men.

CONFLICT OF LAWS—NEGLIGENCE OF RAILROAD COMPANY.—In Walsh v. New York & N. E. R. Co., it was held by the Supreme Judicial Court of Massachusetts that a Massachusetts court will enforce a right of action for personal injury arising under the common law of another State, as there understood and administered, where there is only slight variance of view in Massachusetts, not amounting to a fundamental difference of policy. The supposed Connecticut rule requiring railroad companies to exercise reasonable inspection of foreign cars is not opposed to the Massachusetts rule on that question, even apart from statute. Holmes, J., says:

This is an action of tort to recover for a personal injury suffered by the plaintiff in Connecticut. The injury was caused by a broken drawbar on a foreign freight car, which did not belong to the defendant. Whether the defendant was using it, or, as we suppose, simply was forwarding it, is not stated. The plaintiff testified, and we assume, that it was customary to inspect freight trains at certain points named, and the evidence tended to show that the injury was due to the negligence of the inspectors at one of these points. In other words, the regulations of the defendant were sufficient, so far as appears, and the only wrong was the negligence of the inspector on the particular occasion, seemingly, in omitting to inspect the train. The court ruled, in substance, that under the Massachusetts decisions, if the accident had happened here, the injury would have been regarded as due to the negligence of a fellow-servant, and the plaintiff could not have recovered. This was not excepted to. Mackin v. Railroad Co., 135 Mass. 201, 206; Coffee v. Railroad Co., 155 Mass. 21, 24, 25, 28 N. E. Rep. 1128.

Certain extracts from the case of McElligott v Randolph, 61 Conn. 157, 161, 162, 164, 22 Atl. Rep. 1094 were put in evidence. The judge ruled that the jury was authorized to find that the law of Connecticut was different from that of Massachusetts in this respect, and that if, by the law of Connecticut, the plaintiff could maintain his action there, a verdict might be found for him here. These rulings were excepted to by the defendant. With regard to the former, we have some hesitation. The extracts from the Connecticut case, taken by themselves, state nothing that might not be laid down in Massachusetts; for instance, in explaining the personal duty of a master to see that reasonable care is exercised to provide reasonably safe machinery. Ford v. Railroad Co., 110 Mass. 240, 260, is one of the cases cited as authority for the propositions. Others are Hough v. Railway Co., 100 U. S. 213, citing the same case, and Davis v. Railroad Co., 55 Vt. 84, citing and relying on Holden v. Railroad Co., 129 Mass. 268. But in McElligott v. Randolph, the facts give a somewhat different complexion to the language used. The accident in that case happened in taking down a wheel, and was assumed to be due to the fact that the superintendent had gone home. Superintendence was necessary, in order that the work should be done safely; and it was held that the defendants had not done their whole duty in furnishing a competent superintendent, but that they were bound to see that oversight was exercised. The case is not exactly in point, but it seems to us that the argument is much stronger for the proposition that reasonable inspection of foreign cars is one of the duties which a railroad is bound to see performed, and that the decision affords some ground for the inference that the Connecticut courts would adopt that proposition.

If, however, we assume—as was ruled, and as we do assume—that if the accident had happened in this State the plaintiff could not have recovered, it is argued that he cannot recover now. A decision in Wisconsin, and language from some English cases, are cited, which more or less favor this contention.

Anderson v. Railway Co., 37 Wis. 321; The Halley, L. R. 2 P. C. 193, 204; Phillips v. Eyre, L. R. 6 Q. B. 1, 28, 29; The M. Moxham, 1 Prob. Div. 107, 111. Possibly, when it becomes material to scrutinize the question more closely, the English law will be found to be consistent with our views. But, however this may be, we are of opinion that, as between the States of this Union, when a transitory cause of action has vested in one of them under the common law as there understood and administered, the mere existence of a slight variance of view in the forum resorted to, not amounting to a fundamental difference of policy, should not prevent an enforcement of the obligation admitted to have arisen by the law which governed the conduct of the parties. See Higgins v. Railroad Co., 155 Mass. 176, 29 N. E. Rep. 534. It is unnecessary to consider whether we should be prepared to adopt, in its full extent, what is thought by the learned editor of Story, Confl. Laws (8th Ed.), § 625, note a, to be the true doctrine,—that "whether the domestic law provides for redress in like cases should, in principle, be immaterial, so long as the right is a reasonable one, and not opposed to the interests of the State." The cases cited (Dennick v. Railroad Co., 103 U. S. 11, and Leonard v. Navigation Co., 84 N. Y. 48), go further than the decisions of this State (Richardson v. Railroad Co., 98 Mass. 85). The policy of the supposed Connecticut rule cannot be said to be opposed to that prevailing here, even apart from statute. See St. 1893, ch. 359.

TAX SALE—RECOVERY OF MONEY PAID—LIABILITY OF MUNICIPAL CORPORATION.—In Pennock v. Douglas County, 58 N. W. Rep. 117, it was decided by the Supreme Court of Nebraska that in the absence of an express statutory mandate, a city of the metropolitan class cannot be compelled, either at law or in equity, to refund money received by it from a purchaser of real estate at a sale made thereof by the county treasurer for the purpose of collecting a special assessment or tax levied against such real estate by said city, and for which special assessment or tax said real estate was not liable. The rule *caveat emptor* applies with full force to such a purchaser. Bagan, C. J., says:

The question presented by this appeal is this: In the absence of an express statutory mandate, can a city of the metropolitan class be compelled to refund money received by it from a purchaser of real estate at a sale made thereof by the county treasurer for the purpose of collecting a special assessment or tax levied against such real estate by said city, and for which special assessment or tax said real estate was not liable? The learned counsel for appellant contends that the rule *caveat emptor* does not apply to such a purchaser, and in support of this contention, and that the question stated above should be answered in the affirmative, has furnished us an able and exhaustive brief and argument, in which he has cited many authorities. We have carefully examined all the cases cited by him, and it is not to be denied that the contention of counsel is supported by the decisions of the courts whose opinions are entitled to much weight. The rule contended for by appellant seems to be the doctrine of the Supreme Court of Iowa. In Corbin v. City of Davenport, 9 Iowa, 239, it is said: "A purchaser at an invalid sale of property by a city for taxes may recover from the city the amount of the purchase money and interest." It does not appear from the opinion that it was predicated upon a statute making cities liable in such cases. Such, also, seems to be the rule in Wisconsin. In Norton v. Supervisors, 13 Wis. 684, it is said: "Where a tax sale is void, the county is liable to the holder of certificates issued on such sale for the amount paid, with interest. The statute makes it the duty of the treasurer to refund the money in such cases, on demand, to the purchaser or his assigns; but the liability of the county does not depend upon this statute, and whatever remedy it gives, is cumulative to the right of action for money had and received." This case was cited with approval in Van Cott v. Board of Sup'rs, 18 Wis. 259. In Chapman v. City of Brooklyn, 40 N. Y. 342, the City of Brooklyn caused an assessment to be levied upon certain lots to pay the expense of grading and paving a certain avenue. The admitted benefits of this improvement to the two lots were assessed against parties who were not the owners of them. By the law in force in such cases, judgment for the amount of the assessment was rendered against the persons so assessed; executions issued on such judgment, and returned unsatisfied. The lots were then put up for sale by the street commissioner, and sold to a purchaser, who paid over the amount of the bid, and received the certificate of sale. The money was transmitted by the street commissioner to the city treasurer. An action was then brought against the city, by the assignee of this certificate, to recover back the money paid, on the grounds that the assessment proceedings were absolutely void for want of jurisdiction, the assessment not having been made against the owners of the lots. The court held that the assessment was void because not made against the owner of the lots, and, by a divided court, that plaintiff could recover the money paid to the city, on the ground of an entire failure of consideration. In Phillips v. Mayor, etc., 31 N. J. Law, 143, that court said: "Where there was a sale of real estate to pay for an improvement in the City of Hudson, and a declaration of sale delivered in pursuance of a void ordinance, held, that the purchase money could be recovered back in an action of *assumpsit* against the city." This case was also decided by a divided court. The foregoing are all the authorities cited by counsel for the appellant which can be said to be squarely in point, and support his views. Counsel, however, refers us to the following: Pettit v. Black, 8 Neb. 52; Reed v. Merriam, 15 Neb. 323, 18 N. W. Rep. 137; and Merriam v. Hemple, 17 Neb. 345, 22 N. W. Rep. 775,—as authority for the doctrine for which he argues. These cases, however, do not support appellant's contention. In each of these cases, while the tax deeds which the purchaser obtained at the tax sale were wholly void, the taxes for which the property was sold were valid liens on the property, and, furthermore, the decisions in these cases were based on a statute. Counsel also cites us to Wilson v. Butler Co., 26 Neb. 676, 42 N. W. Rep. 891; but this was a suit by Wilson against the county, and the opinion is predicated on a statute. Another Nebraska case cited by counsel is Clark v. Saline Co., 9 Neb. 516, 4 N. W. Rep. 246. In that case Saline county conveyed a tract of land to one Hunt, and paid him $500 in money, in consideration of which Hunt agreed to build a bridge across the Blue river. Hunt assigned his contract to Clark, and conveyed him the land. Clark built the bridge, and the county accepted it.

The title to the lands having failed, Clark sued the county for the value of the bridge, and the court held that he was entitled to recover. But there is a wide distinction between the legal *status* of a purchaser of the property sold at a tax sale and that of one who builds an improvement for a county, and receives land or other property in payment for such improvement, the title to which fails. Appellant's case is not within the principles of the case just cited. Pimental v. City of San Francisco, 21 Cal. 352; Taylor v. People 66 Ill. 322; Louisiana v. Wood, 102 U. S. 294; and Chapman v. County of Douglass, 107 U. S. 348, 2 Sup. Ct. Rep. 62,—also cited by appellant's counsel,—are analogous in principle to Clark v. Saline Co., *supra*, and need not be further noticed.

As opposed to the rule contended for by appellant's counsel are Lynde v. Inhabitants, etc., 10 Allen, 49, where it is said: "If a tax title proves invalid, the purchaser at the collector's sale cannot maintain an action against the town to recover back the money paid by him as the consideration of the purchase. No precedent for maintaining such a suit is known, and the plaintiff's counsel rests his argument solely upon the ground that defendants have received the amount of the tax without consideration. . . . There is a plain distinction between the right of a person to recover from a town the amount of a tax unlawfully assessed upon him, and the claim of a purchaser under a collector's deed, whose title proves defective. . . . A purchaser is a mere volunteer in the payment of taxes. He has the same means of knowing when it is legally assessed as the town has. He buys the title without warrant except such covenants as he takes from the collector, and he must rely upon them. Beyond these covenants his deed is in the nature of a mere quitclaim, for which he has paid what he thought the chance was worth. His speculation may prove very profitable or wholly unproductive; but no one has taken his property without his consent, or with any contract, expressed or implied, to reimburse him if his bargain proves a losing one." Such is the rule in the State of Indiana. In Churchman v. City of Indianapolis, 110 Ind. 259, 11 N. E. Rep. 301, it is said: "Money voluntarily paid on a demand in the nature of a tax—and a street assessment is such—cannot be recovered back, in the absence of an express statutory provision authorizing such a recovery. The doctrine of *caveat emptor* applied as fully to sales for assessments for street improvements as to any other analogous class of sales. The recital, in a deed executed by a city treasurer upon the sale of lands in satisfaction of an assessment for a street improvement, that, "it appearing from the records of the common council of this city in the city clerk's office that the aforesaid lands were legally liable for such taxes, is not a representation of fact upon which the grantee had a right to rely." To the same effect, see State v. Casteel, 110 Ind. 174, 11 N. E. Rep. 219; Worley v. Town of Cicero, 110 Ind. 208, 11 N. E. Rep. 227; Board v. Armstrong, 91 Ind. 528; and City of Logansport v. Humphrey, 84 Ind. 467, where it is said: "A purchaser at a tax sale assumes all risks, and, if the sale proves invalid, has no remedy against the municipality." This also seems to be the rule at present in New Jersey. In Casselbury v. Inhabitants, etc., 43 N. J. Law, 353, it is said: "A municipality is not bound to refund the purchase money received on a tax sale merely because there has been illegality in the proceedings which defeats the title of the purchaser, as the rule of law applicable to such a case is that the municipality is under no obligation to refund the purchase money because the title is void. A purchaser is a volunteer, and buys at his own risk." This also seems to be the doctrine in California. In Loomis v. County of Los Angeles, 59 Cal. 456, it is said: "In an action against a county to recover purchase money paid by the plaintiff at a void tax sale there is no rule of law authorizing plaintiff to recover." See, also, Harper v. Rowe, 53 Cal. 233. This also seems to be the rule in New York, notwithstanding the case of Chapman v. City of Brooklyn, *supra*. See Swift v. City of Poughkeepsie, 37 N. Y. 511; Phelps v. Mayor, etc., 112 N. Y. 216, 19 N. E. Rep. 408. Such is the rule in Kansas. In Sullivan v. Davis, 29 Kan. 28, it is said: "The rule *caveat emptor* is, except as limited or qualified by express provisions of statute, universally applicable to all purchasers at tax sales" See, also, Board v. Geis, 22 Kan. 381; Sapp v. Commissioners, 20 Kan. 243; Commissioners v. Walker, 8 Kan. 431; Phillips v. Board, 5 Kan. 412. In Railway Co. v. Dinwiddie, 13 Fed. Rep. 789, it is said: "An assessment made in strict accordance with the State constitution relating to the assessment of railway property, which violates the provisions of the fourteenth amendment to the constitution of the United States is void; but the payment made under it is not a payment under duress, but is voluntarily, and cannot be recovered back." In Cooley on Taxation (1st Ed. p. 328) it is said: "A tax sale is the culmination of the proceedings which are matters of record; and it is a reasonable presumption of law that, where one acquires rights which depend upon matters of record, he first makes search of the record in order to ascertain whether anything shown thereby would diminish the value of such rights, or contain any contingency to defeat them. A tax purchaser clearly cannot be, in a strict technical sense, a '*bona fide* purchaser,' as that term is understood in law, because a *bona fide* purchaser is one who buys an apparently good title without notice of anything calculated to impair or affect it. But a tax purchaser is always deemed to have such notice when the records show defects. He cannot shut his eyes to what has been recorded for the information of all concerned, and rely implicitly upon the action of the officers, assuming what they have done is legal because they have done it. It is, indeed, a presumption of law that official duty is performed, and this presumption stands evidence in many cases, but the law never assumes the existence of jurisdictional facts; and throughout the tax proceedings the general rule is that the taking of any one important step is the jurisdictional prerequisite to the next, and it cannot therefore, be assumed, because one is shown to have been taken, that the officer performed his duty in taking that which should have preceded it." In Desty on Taxation (section 850) it is said: "Except as limited and qualified by express statutory provisions, the rule [*caveat emptor*] applies to all purchasers at tax sale, and, if the public has nothing to sell, the purchaser gets nothing. Purchasers are bound to know, at their peril, that the supposed delinquent is in fact delinquent; that he has been lawfully assessed, and has failed to make payment. . . . The purchaser at a municipal sale for taxes buys at his own risk, and at his peril investigates the proceedings. A county does not guaranty tax titles except as the statute may provide, and cannot be made to refund money upon the failure of such titles."

We are urged by counsel for appellant to hold the city of Omaha liable in this upon moral grounds, but we cannot do so. The city did not ask appellant to

purchase at his tax sales. He was a "volunteer," with all that that term implies. He bought without warrant or covenant of any kind, and bid what he considered the venture worth; and under these circumstances, and in a case like the present, where there was no fraud, no misrepresentation, and no mistake of the facts, it is well settled, as between individuals, that the purchaser is without remedy in case of failure of title. Rawle, Cov. § 321, and cases there cited. In this case appellant knew, when he made the purchase, that in case of redemption he would receive a return on his investment, unusually large. If the owners of the property failed to redeem the same, he could, under the statute, foreclose his lien. and obtain title to valuable property for a very small part of its actual worth. Appellant claims that he should be given all these advantages for unusual profits, but at the same time he should be fully indemnified against any risk of loss. In no other line of business—under no other circumstances—would such a claim be made. In the interest of the public revenue, and as an inducement to buy at tax sales, our law presents tempting offers to the speculator; but, until the legislature shall so expressly declare, the courts will not place the responsibility upon cities of refunding money paid by purchasers for property at sales made thereof for taxes. Budge v. City of Grand Forks (N. D.), 47 N. W. Rep. 390. A consideration of the authorities reviewed above leads us to the conclusion that the rule *caveat emptor* applies with full force to purchasers of property at tax sales, and constrains us to the conclusion that, in the absence of a statute therefor, no municipality can be compelled, either at law or in equity, to refund money which it has received from sale of real estate for taxes, even in cases where the property against which such taxes were levied was not liable therefor.

MANDAMUS TO THE SPEAKER OF A LEGISLATIVE ASSEMBLY.

It was suggested to the writer that a paper on the subject above might be of general interest. in view of the fact that a contest between the speaker of the lower branch of Michigan's legislature, and one of the members thereof, recently attracted considerable attention. This application of relator has been denied but upon grounds somewhat ddifferent than those discussed herein. In this case an application has been made to the Supreme Court of the State for a writ of *mandamus* to compel the speaker to receive and have placed upon the records of such assembly certain objections and counter charges to certain statements incorporated in resolutions previously adopted by this legislative body, the said objections and counter charges being called a protest. The interpretation of constitutional provisions by the courts of the different States, as also the point of distinction between such acts of an officer of this class, which are purely ministerial. and those acts in which a large discretion is allowed in his favor, are questions which are more or less involved here. With few exceptions the courts of the different States seem not to have been called upon to decide this question, at least directly. In a number of cases where the respondent was the chief executive of the State, a rather pointed inference is found in the opinions of the courts against the use of this extraordinary legal remedy when the writ is directed toward one of the co-ordinate branches of the government. Judge Cooley, of Michigan, is hostile to any attempt on the part of the judiciary to interfere with the legislative function and inferentially we believe hostile to any interference by the judiciary with the presiding officer of one of the component parts of the legislative body of the government, while in the discharge of his duties and in reference to his official duties either ministerial or discretionary. It is true that the Michigan Supreme Court has never passed directly upon this question. But its fate can well be determined had it come before the court while Judge Cooley or Judge Campbell honored that bench with his presence, as note the significant language of Mr. Justice Cooley in the case of Sutherland v. Governor:[1] "The legislature in prescribing rules for the courts, is acting within its proper province in making laws which the courts in declining to enforce an unconstitutional law, are in like manner acting within their proper province, because they are only applying that which is law to the controversies in which they are called upon to give judgment. It is mainly by these checks and balances that the officers of the several departments are kept within their jurisdiction, and if they are disregarded in any case, and power is usurped or abused, the remedy is by impeachment and not by another department of the government attempting to correct the wrong by asserting a superior authority over that which by the constitution is its equal." And again, "In these cases the exemption of the one department from the control of the other is not only implied in the frame-work of government, but is indispensably necessary if any useful apportionment of power is to exist." The above cited case is the leading Michigan case and

[1] 29 Mich. 324-325.

establishes the position of this court in so far as the chief executive is concerned. That there is much difference, relatively, between the governor of a State and the presiding officer of a deliberative assembly, needs no comment. And yet in the case of a mandatory process, such as *mandamus*, issued to either one of these officials, under the constitutional provisions of governmental policy, there is much in common in the attitude of both toward the judicial department of the State. Judge Cooley suggests in the opinion above referred to, the embarassment to the court, that a refusal on the part of the chief executive to comply with its order would occasion. The highest tribunal in the State without power to enforce its mandate. Truly not an edifying spectacle to the people whose creatures both are. Such an embarrassment would detract from the dignity of the court and could not increase respect for the executive. "An unseemly conflict if not something worse." And here is the strong line of similarity with the relative attitude of the speaker of a legislative assembly. How will you enforce your mandatory order against him? So far as Michigan is concerned, at least, he is guaranteed immunity from arrest "except for treason, felony or breach of the peace" during the session of the legislature.[2] And presumably the States, generally, follow the provision in the federal constitution for this immunity.[3] Apparently there is no distinction made as between the speaker and other members in this respect. He is simply one of a little community chosen to preside at their meetings. His assembly forms one of the component parts of the coordinate branch of the government to which we look for the passing of our written or statute law. Absolutely free from interference while thus engaged either from the executive or judiciary, the other functions of the governmental policy. The members of this body are the sole judges and jurors upon the question of the qualifications of its members. And no appeal outside of the assembly would avail aught to keep one of its members who had been expelled from that body even were the reasons as trivial as those of a political nature.[4] This assembly is clothed with power to punish for breaches of duty and discipline committed within itself. It is a constitutional court to try and punish its own members, and there is no appeal therefrom. The rules provide for the punishment of the speaker. That punishment is impeachment. This must be for corruption, or for crimes or misdemeanors. Why is this extraordinary latitude allowed to this branch of the legislature, if not to remove as far as possible this legislative function from that of the judiciary, or the executive? This body has the power to punish its speaker to the extent of a removal from office for causes indicated. In its application to members this power may be exercised independent of causes and reasons; it may be inferred from the fact of published instances, and the fact that courts cannot inquire into the justice of the decision, or even so much as examine the proceedings to see whether opportunity for defense was furnished or not.[5] Without unnecessarily prolonging argument upon this feature of the question it may be here stated that either from its constitutional origin or as a necessary inherent principle of parliamentary practice, there exists always within a legislative assembly the power necessary to a proper discipline of its members, as much so, for the time being, as would exist within any small well regulated community of citizens perhaps. But now the speaker refuses to obey the mandate of the court. He intrenches himself behind his constitutional privilege. Can he be reached by attachment as for contempt? If his offense consists in an unsatisfactory exercise of a discretionary privilege, we would say decidedly not. There are a few cases where the court has permitted a *mandamus* to issue against the speaker where the act complained of was the refusal to perform a duty purely ministerial and a duty imposed by the constitution of the State.[6]

The Supreme Court of Nebraska had previously held against the issuing of this writ in such cases especially where the duties sought to be enforced were of a purely discretionary character. In the case above the language of the court is: "In these examples the court observed the literal sense of article (2) of the constitution, construing its meaning and intent to be, that the respective du-

[2] Sec. 7 of Article 4.

[3] Sec. 6, Art. 1 Fed. Con.

[4] See Cooley's Con. Lim., 2 Ed. star page 133.

[5] See Cooley Const. Lim., 2d Ed. 133; Hiss v. Bartlett, 3 Gray, 468.

[6] Benton v. Elder, 31 Neb. 169.

ties incumbent upon and applicable to each separate department of the government is confined to it alone; but it did not take the view, nor can it now, that where an officer of either the legislative or executive department or the judicial, shall refuse to execute an imperative duty imposed by law upon the office of the incumbent to the detriment and prejudice of a citizen or of the public, that through this constitutional provision, while the courts have full power of redress in cases of delinquent judicial officers, they are prohibited from considering any flagrant violation of the constitution or of laws by officers of other departments, lest the courts trench upon their prerogative. No such limited and sinister construction can be placed upon the second article without violating the spirit of the first and violating many of its provisions. In the recent application for *mandamus* of Bates, relator, against the governor and the State board of canvassers to certify the election of the relator to a judicial office, we held that in a proper sense, to enforce the performance of a ministerial duty which the law especially enjoins as incident to an officer, the writ would issue against officers of the executive department and even against the supreme executive authority." This is all very good, but in the event of its being done and the governor a pugnacious person, insisting upon his prerogative, refuses to obey its mandate, how would the court enforce its order? Would it not end as Judge Cooley suggests in "unseemly conflict or something worse?" This opinion "smacks of the same sentiment" as Chief Justice Agnew's dissenting opinion in Governor Hartranft's Appeal.[7] This dissenting opinion of Judge Agnew is an able exposition of the relative powers of the co-ordinate branches of government under the constitution. As to the claimed superiority of the judiciary he says: "There never was a time when it has not been engaged in passing upon the acts of both the other branches, in resolving the constitutionality and interpretation of the laws, and the regularity of executive acts. This needs no citation of authority." "It is idle," says Chief Justice Gibson, "to say the authority of each branch is defined and limited in the constitution, if there be not an independent power able and willing to enforce its limitation." From its very position it is apparent that the conservative power is lodged with the judiciary, while in the exercise of its undoubted right is bound to meet every emergency." "It has become," he adds, "the duty of the court to temporize no longer, but to resist temperately, though firmly, any invasion of its province whether great or small. How futile would be the judicial power to punish crime, or vindicate innocence, if the governor having exclusive knowledge of the facts bearing upon either, could defy the process of the law at pleasure." This is a leading Pennsylvania case. The question at issue was whether or not the governor of Pennsylvania, could while engaged in and about the official duties of his office be subject to the summons of the court, or grand jury sitting in one of the jurisdictions of the State, to give evidence of certain official communications sent to his office. The court in a majority opinion held not. The governor being invested with large discretionary power in order to carry out the duties of his office under the constitution, and with those discretionary powers no interference should be allowed, and even when such duties are purely ministerial such a course would be in derogation of the policy of State government and not according to the constitution. But Mr. Chief Justice Agnew further on in his opinion uses the strong language: "In a government of law instituted by a free people for their own benefit, there is no royal prerogative to do nothing wrong and therefore there can be no representation of their dignity such as can strike down their law and prevent its administration by its appropriate functionary." On no ground of the constitution, law, public justice, State policy or sound reason can I discover any exemption of any officer in the State, high or low, from the common duty all citizens owe to the due administration of justice." However, the majority of the Pennsylvania court refused to endorse the views of the learned chief justice, but claimed for the chief executive of a State an immunity consonant with the constitution and public policy.

As before suggested there are a number of cases and courts in which the governor of the State has been the respondent in this kind of proceeding: Jonesboro, etc. Turnpike Co. v. Brown.[8] This was an application for *mandamus* to compel the governor of Tennessee

[7] 85 Pa. St. 433.

[8] 8 Baxt. 490 (Tennessee).

to issue certain bonds to the Turnpike Co. These bonds it was alleged the legislature had authorized the issue. The court observes, "as to purely executive or political functions devolving upon the executive, or as to duties necessarily involving the exercise of official judgment and discretion, we think it may be safely assumed that *mandamus* will not lie," citing High on Ex. Leg. Rem.[9] As to duties of a ministerial nature and involving no element of discretion, which have been imposed by law upon the governor of the State, the authorities are exceedingly conflicting and indeed utterly irreconcilable. Upon the one hand it is contended and with much show of reason that as to duties of this character the general principle allowing relief by *mandamus* against ministerial officers should apply, and the mere fact of ministerial duties having been required of an executive officer should not deter the courts from the exercise of their jurisdiction. Upon the other hand, it is held that under the structure of our government with its three distinct departments, executive, legislative and judicial, each department being entirely independent of the other, neither branch can properly interfere with the duties of the other. And as to the nature of the duties required of the executive officer by law, and as to his obligations to perform these duties, it is entirely independent of any control of the judiciary." This latter doctrine seems to have the clear weight of authority in its favor.[10] While the courts of Ohio, Alabama, California, Maryland, North Carolina and perhaps others favor the jurisdiction of the court where the duties to be performed are shown to be ministerial. In Alabama the Supreme Court issued a *mandamus* against the speaker, compelling him to sign the usual order on which a member might obtain his *per diem* compensation, there having been a refusal to sign in the case of this particular legislator. It is also the fact that the Supreme Court of Ohio has practically held that a writ of *mandamus* will lie against a legislative officer. The court of that State in a case of an officer who required a certificate as to his election from both branches of the legislature, one house certified that his name was Samuel and the other that it was Lemuel. In its finding the court makes this statement: "Should the speaker refuse to sign such certificate, a contingency by no means probable—power is vested in the court to compel them." It has been held that a *mandamus* would lie to compel the performance of duties purely ministerial in their nature, and when they are so clear and specific that no element of discretion is left in their performance. But as to acts or duties necessarily calling for the exercise of judgment and discretion on the part of the officer or body at whose hands their performance is required, the writ will not lie.[11] Again a *mandamus* can only issue in cases when the act to be done is merely ministerial and the relator is without other adequate remedy.[12] But where certain powers and duties are confided to such officer, involving the exercise of judgment and discretion, there exists no power in the courts by any of its processes to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action.[13] The case before the Michigan court, Barkworth, relator, comes under the section of the State constitution providing for the right of protest. Section 10 of Art. 4, reads as follows: "Any member of either house may dissent from and protest against any act, proceeding, or resolution which he may deem injurious to any person or the public, and have the reason of his dissent entered on the journal." A kindred right to that of petition is claimed under this constitutional provision. That if a petition sent in due form to the legislature had been refused there is power somewhere to compel them to receive it. If this power is in the Supreme Court and that function of the government would interfere in the one case, it would inferentially have jurisdiction in the matter of the protest. Each house of the legislature keeps a journal of its proceedings

[9] Sec. 118.

[10] See Hawkins v. Gov., 1 Ark. 570; Bisbee v. Drew, 17 Fla. 67; Low v. Towns, 8 Ga. 360; People v. Bissell, 19 Ill. 229; People v. Yates, 40 *Id.* 126; State v. Warmouth, 22 La. Ann. 1; *In re* Dennett, 32 Me. 508; Sutherland v. Gov., 29 Mich 320; Rice v. Gov., 19 Minn. 103; State v. Gov., 39 Mo. 388; Inquiries by Gov., 58 *Id.* 369; State v. Gov., 25 N. J. Law, 331; Mauran v. Smith, 8 R. I. 192; Houston Ry. Co. v. Randolph, 24 Tex. 317; Turnpike Co. v. Brown, 8 Baxt. 490; Vicksburg & M. Ry. Co. v. Lowry, 61 Miss. 102.

[11] State v. Parish of St. Barnard (La.), 2 South. Rep. 305.

[12] United States v. Guthrie, 17 How. 284; United States v. Seaman, *Id.* 225.

[13] U. S. v. Seaman, 17 How. 225; U. S. v. Guthrie, *Id.* 284; Com'r of Pat. v. Whiteley, 4 Wall. 522; U. S. v. Com., 5 Wall. 563.

which is a public record and of which the courts take judicial notice. If it should appear from these journals that any act did not receive the requisite majority or that in respect to it the legislature did not follow any requirement of the constitution, or that in any other respect the act was not constitutional, the courts may act upon this evidence, and declare their action void. But when the legislature is acting in the apparent performance of legal functions every reasonable presumption is to be made in favor of its action. It will not be presumed in any case from the mere silence of the journals that either house has exceeded its authority, or disregarded a constitutional requirement in the passage of legislative acts, unless where the constitution has expressly required the journals to show the action taken, as for instance where the ayes and nays are required to be taken.[14]

It was the desire of the relator in this Michigan case, without any doubt, to make a strong counter showing, politically, to resolutions previously passed by the majority of this branch of the legislature. He did it in way of a protest. Now comes the question, did the speaker in refusing to receive for record this protest so called, act within the ordinary discretionary powers of a presiding officer of a legislative body, or did he violate a provision of the organic law, the constitution. When the constitution in explicit terms imposed upon him the duty to see that such and such a duty was to be performed. It would seem that large discretionary power is lodged, of necessity, in the hands of the speaker of a legislative assembly. Is he not to be the judge, largely, of the pertinence or impertinence of the language used in petitions or protests? His action in this case was dictated by an alleged want of propriety, we believe, in the language in which this proposed protest was couched. There can be no kind of question, we believe, that, to decide whether or not a protest is couched in proper language is purelywithin the province of the speaker of a legislative assembly. If a proper protest, under an express provision in the constitution providing for its reception, perhaps the exercise of discretion is not left with the speaker. It has been decided in the house of representative under the federal constitution that it is not a matter of right and parliamentary privilege to have received and entered upon the journal a protest of members against the action of the house,[15] and in Journal 2, 33, p. 451, a demand to enter a protest upon the journal does not present a question of privilege. But in the case of the National House of Representatives there is no constitutional provision imposing this duty. Under a clause like this one in the Michigan constitution, may not the right to protest become almost as sacred as the right to petition? Of this right Judge Cooley says, referring to the section of constitution in the State tax cases:[16] "This section gives the people and was intended to give to the people the right to present their views to the legislature on any subject which is of legislative cognizance. The members of this commission had an undoubted right from day to day and from hour to hour to put their views on proposed changes in their bill before the legislature in the form of petitions, and that body could not have refused to receive the petitions." Judge Story upon the matter of petition says, "It is impossible that it would be practically denied until the spirit of liberty had wholly disappeared and the people become so servile and debased as to be unable to exercise the common privileges of freemen." Whether there is such kindred relation between these constitutoinal rights has yet to be determined.

PERCY L. EDWARDS.

[14] See Cooley Con. Lim., star page 135; Supervisors v. People, 25 Ill. 181.

[15] Cong. Globe, 1, 31, pp. 1579, 1588; See also Journal 2, 45, pp. 921-927.

[16] 54 Mich. 382.

CRIMINAL LAW—NEW TRIAL—DRUNKENNESS OF JUROR.

BROWN V. STATE.

Supreme Court of Indiana, April 4, 1894.

In a capital case, where jurors have been allowed to separate at each day's adjournment, and one evening a juror has been drunk, but the next day appeared in his place, not obviously drunken, there being some good evidence of defendant's insanity, a new trial should be granted.

COFFEY, J.: The appellant was indicted in the Bartholomew Circuit Court upon a charge of murder in the first degree. A trial of the cause by jury resulted in a verdict of guilty, fixing the death penalty. Over a motion for a new trial, the court rendered judgment upon the verdict,

and named a day on which the sentence should be executed. From this judgment thus rendered, the appellant prosecutes this appeal, and assigns as error—First, that the Circuit Court erred in overruling a motion to quash the indictment; second, that the court erred in overruling the appellant's motion for a new trial.

The indictment is substantially such as has often been held sufficient by this court. It would unnecessarily incumber this opinion to set it out here, as no good purpose would be subserved thereby. We think it is a good indictment for murder in the first degree, and that the court did not err in overruling a motion to quash it.

The trial of the cause began on the 12th day of December, 1893. The time of the court was consumed in hearing evidence from that date to the 15th of the month. Without any objection, the jury was permitted to separate at each adjournment of court. After hearing the evidence from 9 o'clock in the forenoon until 4:30 in the afternoon on Wednesday, the 13th day of the month, one of the jurors, about 8 o'clock, after court had adjourned for the day, became intoxicated, and was known to be intoxicated up to 10 o'clock of that evening. At the convening of court on the next morning, the juror was in his seat, and remained on the jury, and assisted in making the verdict against the appellant. It is contended by the appellant that this was such irregularity and misconduct on the part of the jury as vitiates the verdict. It is said that the misconduct of one juror, so far as it may affect the verdict, in contemplation of law is the misconduct of all. Moore Cr. Law, § 417. It seems to be well settled in this State, as well as in other jurisdictions, that drinking intoxicating liquor during the recess of the court is not such misconduct of the jury as vitiates the verdict, unless the drinking is to such an extent as to produce intoxication; but, where a juror drinks to such an extent as to become intoxicated, such conduct renders the verdict invalid, and the court, upon proof of such misconduct, should set it aside, and grant a new trial. Creek v. State, 24 Ind. 151; Davis v. State, 35 Ind. 496; Huston v. Vail, 51 Ind. 299; Pratt v. State, 56 Ind. 179; Carter v. Ford, 85 Ind. 180; Pelham v. Page, 6 Ark. 535; 4 Cr. Law Mag. p. 305, pars. 10, 11; State v. Cucuel, 31 N. J. Law, 249; Jones v. State, 13 Tex. 168. In the case of Ryan v. Harrow, 27 Iowa, 494, the court declined to enter into the question as to whether the juror drank to intoxication, but said: "The drinking of intoxicating liquors by one or more of the jurors, during the discharge of their duties as such, constituted sufficient ground for setting aside the verdict and ordering a new trial. The view we take of the case will relieve us of the duty of determining whether the charge of intoxication is sustained by the record; and we are glad to escape so unpleasant an investigation, which might result in convincing us that the administration of the law in our State has been disgraced by the drunkenness of those appointed to decide, in a court of justice, upon the right of their fellow citizens. We had hoped that such things were of the past, and would only be remembered as rare instances existing in the traditions of frontier days." In the case of Jones v. State, *supra*, it was said by the Supreme Court of Texas, after a quotation from Scotland's most popular bard: "Yes, it is but too true that it [intoxicating liquor] will make a man bold and reckless, not only of consequences, personally, but also of the rights of those whose life and most valuable interests—property and reputation—are at stake; and its effects are so very different on different men that it would be dangerous in the extreme to attempt to lay down any rule by which it could or should be determined whether a juror had drank too much or not, and the only safe rule is to exclude it entirely." In this case we are not required to go to the extent to which these cases lead us. It is not denied by the State that the juror in question was intoxicated, as charged in the affidavits filed in support of the motion for a new trial. In the administration of the law, it sometimes becomes necessary to take human life, upon the assumption that the good of society demands it; but when life is to be taken the legal proceedings leading to such a result should be free from any error, the nature of which could result in injury to the accused. No more solemn duty could be imposed upon a tribunal than that of passing the death sentence upon a fellow being, and, when this duty is to be performed, there should be no reasonable doubt that the unfortunate subject of the sentence has had a fair and impartial trial. In this case, one of the jurors charged with the duty of impartially trying the appellant, at a time when he should have kept his mental faculties in a condition to retain the evidence in the cause, and carefully ponder and weigh it, became intoxicated by the intemperate use of intoxicating liquor. In this condition, it is perfectly plain that he was in no condition to give the case a fair consideration. While it does not appear that he was still intoxicated when he took his seat in the jury box on the next morning, we have no means of knowing the extent to which his mental faculties were beclouded by the previous night's debauch. It is enough to say that the appellant was entitled to have this juror consider and pass upon his case with faculties unimpaired by drunkenness during the progress of the trial. The record in the cause is not of such a character as to warrant us in saying that the intoxication of the juror did injuriously affect the appellant. There was much evidence introduced at the trial of the cause, of an apparently reliable character, tending to prove that the appellant, at the time of the commission of the alleged crime for which he was convicted, was a person of unsound mind. In our opinion the Circuit Court erred in overruling the appellant's motion for a new trial, on account of the misconduct of the jury trying the cause. Judgment reversed, with directions to the Circuit

court to sustain the appellant's motion for a new trial.

NOTE.—The rigor of the common law as to the custody of juries has been much modified by the modern practice. The ancient rule was that a jury, "after the evidence given upon an issue, ought to be kept together in some convenient place without meat or drink, fire or candle which some books call an imprisonment, and without speech with any unless it be the bailiff, and with him only if they be agreed. After they be agreed they may, in causes between party and party give a verdict, and if the court be risen, give a privy verdict before any of the judges of the court, and then they may eat and drink, and the next morning in open court they may either affirm or alter their privy verdict, and that which is given in court shall stand. But in criminal cases of life or member, the jury can give no privy verdict, but they must give it openly in court." Coke Litt. 227*b*. In modern trials the rigors of this practice have been considerably relaxed and jurors are not only permitted to have such reasonable refreshment, medicine and other necessaries as can be furnished without exposing them to outside influence (O'Shields v. State, 55 Ga. 696; Reg. v. Newton, 3 Car. & K. 85; State v. Town, Wright (Ohio), 75; Templeton v. State, 5 Tex. App. 399), but in many jurisdictions they are permitted to separate, pending the trial, when it is manifestly impossible for the court to exercise any very rigid control over their conduct in the matter of eating and drinking. It would seem that the principal object of the common law rule was to prevent an opportunity for bias, for it was settled doctrine that if the jury should eat and drink at their own cost, or otherwise than at the cost, or by the favor, or procurement of the successful party their verdict would be good though the offending jurors would be liable to be fined. Austen v. Baker, 12 Mod. 250; Duke of Richmond v. Wise, 1 Ventr. 125; Rex v. Burdette, 12 Mod. 111, 1 Ld. Raym. 148; Harebottle v. Peacock, Cro. Jac. 21.

With this relaxation of the rule as to custody, have arisen the cases involving the question as to the effect of the use of intoxicating liquors by the jurors, upon the validity of their verdict. Some courts have held that any use of intoxicating liquors by the jurors is ground for new trial without reference to the effect it had upon the jurors who drank it. Jones v. State, 13 Tex. 168 (cited in the principal case); State v. Baldy, 17 Iowa, 39; State v. Bullard, 16 N. H. 139; People v. Douglas, 4 Cow. 26; Leighton v. Sargent, 31 N. H. 120; Briant v. Fowler, 7 Cow. 562; Ryan v. Harrow, 27 Iowa, 494; Gregg v. McDaniel, 4 Harb. (Del.) 367. But the rule most generally adopted is that the mere fact of the drinking of intoxicating liquors by the jurors will not be ground for new trial unless they were drank in such quantities or at such time as to unfit for their duties, or were furnished by the party in whose favor the verdict was afterwards rendered. Fairchild v. Snyder, 43 Iowa, 23; Wilson v. Abrahams, 1 Hill, 207; State v. Upton, 20 Mo. 397; State v. West, 69 Mo. 401; Commonwealth v. Roby, 12 Pick. 496; Russell v. State, 53 Miss. 367; Pope v. State, 36 Miss. 121; Coleman v. Moody, 4 Hen. & M. (Va.) 1; Tripp v. County Comrs. 2 Allen, 556; Roman v. State, 41 Wis. 312; Kee v. State, 28 Ark. 155; Perry v. Bailey, 12 Kans. 539; Larimer v. Kelly, 13 Kans. 78; Westmoreland v. State, 45 Ga. 225; State v. Sparrow, 3 Murph. (N. C.) 487; Davis v. People, 19 Ill. 74; Purinton v. Humphreys, 6 Me. 379; States v. Jones, 7 Nev. 408; Richardson v. Jones, 1 Nev. 405; State v. Caulfield, 23 La. Ann. 148; Stone v. State, 4 Humph. 27; Rowe v. State, 11 Humph. 491; Thompson v. Commonwealth, 8 Gratt. 639; Vaughan v. Dotson, 2 Swan (Tenn.), 348; McCarty v. McCarty, 4 Rich. L (N. C.) 594; Gilmanton v. Ham, 38 N. H. 108.

In Jones v. People, 6 Colo. 452, the Supreme Court of Colorado held that moderate use of liquor by a juror is not ground for reversal, but in the more recent case of Repath v. Walker, 25 Pac. Rep. 917, intoxication by a juror while deliberating on the verdict, seems to have been regarded as sufficient ground for new trial.

Where the defendant and others including jurors were invited by another juror to drink beer and did so, nothing being said about the case, and the jurors making affidavit that their verdict was not influenced by the fact of their having drank with defendant, it was held that there was no ground for setting aside a verdict in his favor. St. Paul, etc. Ins. Co. v. Kelly, 23 Pac. Rep. 1046, 43 Kans. 741. See to same effect, Sanitary District v. Cullerton (Ill.), 35 N. E. Rep. 723. The mere fact that an old juror, habituated to drink, was at the request of his friend, supplied with a single draught of liquor by an employee of the successful litigant, is insufficient ground for new trial where all the evidence, before the trial court on motion for new trial shows that the liquor was not given with the intent to influence the juror's mind, and did not have that effect. Brookhaven L. & M. Co. v. Illinois Central R. Co., 68 Miss. 432, 10 South. Rep. 66. It is not error to refuse to set aside a verdict for misconduct of the jury, because during their deliberations, they requested the bailiff to procure some apples which were passed into the jury room and eaten by them. Morningstar v. Cunningham, 110 Ind. 328, 11 N. E. Rep. 593. If a juror is manifestly intoxicated during the progress of the trial, it is the party's duty to make his objection at that time. He cannot take the chances of a favorable verdict and then ask to have a verdict against him set aside, on that ground. Ipswich v. Fernandez, 84 Cal. 639, 24 Pac. Rep. 298. The fact of intoxication is usually established by affidavits, but where it occurs during the trial and is "patent to all observers," it seems that the court may take judicial notice of it. Ipswich v. Fernandez, 84 Cal. 639, 24 Pac. Rep. 298. But ordinarily the fact must be proved. Cortelyou v. McCarty, 56 N. W. Rep. 620.

HUMORS OF THE LAW.

"Mr. Spriggs," said the law school professor, "from this article on 'Forms of Judicial Procedure,' how many kinds of judgment do there appear to be?" "Two," answered Mr. Spriggs, promptly. "Judgment for the plaintiff and judgment for the defendant."

Mr. Knowlittle (stranger traveling in New York): "Why! what do they have that ax, saw and crowbar up there for? I never saw them on trains in the West." Jackson Dean (*en route* Court of Appeals).—"Well, when they have a collision, the brakeman has orders to take down the ax and kill the injured, because in case of death five thousand dollars is the limit of damages."—

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCORD AND SATISFACTION.—A compromise of honest differences, whereby a less sum than that claimed has been paid and accepted in full of plaintiff's claim, bars the right of plaintiff to insist upon a recovery of the amount originally claimed by him.—SLADE v. SWEDEBURG ELEVATOR CO., Neb., 58 N. W. Rep. 191.

2. ACTIONS—Joinder—Rescission of Sale.—An action against a purchaser to rescind a sale for misrepresentations, and to recover a money judgment, may be joined with one for the recovery of the goods sold from the grantee in a deed of trust executed by the purchaser to secure creditors.—JOHNSON v. STRATTON, Tex., 25 S. W. Rep. 683.

3. ACTIONS—Joinder of Causes.—Under the Massachusetts practice acts, a count on a bill of lading may be united in the same declaration with a count in tort for negligence in the loss of the goods shipped.—CENTRAL VERMONT R. CO. v. SOPER, U. S. C. C. of App., 59 Fed. Rep. 879.

4. ADVERSE POSSESSION.—Taking possession under an instrument which the parties intend to operate as a complete relinquishment of title, followed by the most unequivocal acts of full ownership during the entire period of limitation, without objection by the grantors, will be held to show adverse possession, although it is doubtful whether the instrument, on its face, should be construed as a deed, or only as a mortgage.—SCHLAWIG v. PURSLOW, U. S. C. C. of App., 59 Fed. Rep. 848.

5. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Where partners assign for the benefit of creditors all their property, "except such as are exempt from levy and sale under execution," but file no list of exceptions with the inventory, which includes a stock of goods, nor make any specific selection out of the goods until more than ten weeks after the assignment, they waive an exemption out of such stock.—BONG v. PARMENTIER, Wis., 58 N. W. Rep. 243.

6. BANKS—Insolvent Banks—Receiving Deposits.—Under Rev. St. 1879, § 1350, as amended by Act 1887, making it unlawful for the officers of any bank, "or the owner, agent, or manager of any private bank or banking institution," to receive deposits knowing such bank to be insolvent, the owner of a private bank is liable, though he had not complied with the provisions of the statute in the organization of his bank, and consequently was doing an unauthorized business.—STATE v. BUCK, Mo., 25 S. W. Rep. 573.

7. BANKS AND BANKING—Discounting Firm Note—Notice.—Firm notes payable to the order of one partner and bearing what purported to be his indorsement, were discounted at a bank by another partner, and the proceeds placed to the credit of the firm: Held that, in an action against the indorsing partner, the jury might consider the form of the notes with the other evidence in determining whether the bank was chargeable with notice of a limitation on the authority of the discounting partner to borrow money for the firm.—INTERNATIONAL TRUST CO. v. WILSON, Mass., 36 N. E. Rep. 589.

8. BUILDING AND LOAN ASSOCIATIONS—Usury.—Where, under the provisions of a note to a building and loan association, the amount required to pay a loan at any time,—it being payable on or before a certain time, will, with the interest already paid, amount to more than the loan and 12 per cent. per annum for the use of it, the note is usurious; and the interest paid is to be applied in satisfaction of the principal, though the amount required to be paid from year to year, up to the time the note is to be paid, is less than 12 per cent. per annum.—INTERNATIONAL BLDG. & LOAN ASS'N v. BIERING, Tex., 25 S. W. Rep. 622.

9. CARRIERS—Liability—Loss of Trunk.—The liability of a carrier with respect to the personal baggage of a passenger, after it has reached its destination, is that of a bailee for hire.—NEALAND v. BOSTON & M. R. R., Mass., 36 N. E. Rep. 592.

10. CARRIERS—Passengers—Negligence.—When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury; but, where the facts are such that all reasonable men must draw the same conclusion from them, the question of negligence is one of law, for the court.—OMAHA ST. RY. CO. v. CRAIG, Neb., 58 N. W. Rep. 209.

11. CONSTITUTIONAL LAW—Fees of Clerk—Increase.—Act June 26, 1893, increasing the costs to be paid the clerks of certain courts, does not conflict with the constitutional prohibition of increase in compensation of certain officers during their term of office, since the said clerks receive as their only compensation a salary payable out of the costs collected by them, the surplus going to the county treasury.—PEOPLE v. GAULTER, Ill., 36 N. E. Rep. 576.

12. CONSTITUTIONAL LAW—Legislative Power—Tax Deed.—The legislature has the power to make a tax deed *prima facie* evidence that every requirement of the law necessary to its validity has been complied with.—LARSON v. DICKEY, Neb., 58 N. W. Rep. 167.

13. CONTRACT—Agency—Partnership.—Complainant agreed to take charge of the business and property of defendants' testator, and was, for his compensation, "to receive from the net income of the personal capital one fifth of every transaction," and was to be liable for one fifth of all losses from any business done by him under the agreement: Held, that the relationship created was that of principal and agent, and not a copartnership.—GRINTON v. STRONG, Ill., 36 N. E. Rep. 559.

14. CONTRACT—Cornering the Grain Market.—Under Rev. St. ch. 38, § 130, which makes it a penal offense to "corner the market, or to attempt to do so," and declares all contracts made for that purpose void, there can be no recovery for advances made, and expenses incurred, in purchasing corn in pursuance of an agreement or understanding to enhance the price of corn.—FOSS v. CUMMINGS, Ill., 36 N. E. Rep. 553.

15. CONTRACT—Parol Evidence.—A written contract to convey land cannot be contradicted by contemporaneous parol stipulations intentionally omitted by the parties.—SANBORN v. MURPHY, Tex., 25 S. W. Rep. 610.

16. CONTRACTS—Validity—Restraint of Trade.—Where real estate, consisting of certain lots and the buildings thereon, is sold, and, in the granting portion of the deed conveying the same, a clause is inserted, stating

that the property is not to be used for hotel purposes for two years: Held, that such restriction as to use of the property, being a limited one, was valid, and not an unreasonable restraint of trade, in view of the facts developed by the pleadings (the case having been decided upon the pleadings alone), and that such agreement was not within, or covered by, the prohibitions or provisions of chapter 91a, entitled "Trusts," Comp. St. 1893.—MOLLYNEAUX v. WITTENBERG, Neb., 58 N. W. Rep. 205.

17. CORPORATION — Corporate Stock of Wife. — Gen. St. ch. 52, art. 4, § 15, requiring, in order that a husband take no interest in corporate stock transferred to his wife, that the transfer be expressed on the certificate or transfer book to be "for the use of such female," is not satisfied by a mere transfer to her, without mention or indication of any use.—LOUISVILLE GAS CO. v. CLAY, Ky., 25 S. W. Rep. 590.

18. CORPORATION—Enforcing Stockholder's Liability.—In a proceeding to procure the issuance of an execution against a stockholder on a default judgment against the corporation, it is no defense that the debt for which the judgment was obtained was not the debt of the corporation, as the judgment in such a proceeding is conclusive upon the stockholder.—NICHOLS v. STEVENS, Mo., 25 S. W. Rep. 578.

19. CORPORATION—Evidence of Contract. — In an action against a corporation for the cost of printing and publishing a newspaper, evidence that plaintiff had a contract with individuals from whom defendant purchased the newspaper, and who were the principal stockholders of defendant, to do such work for the profit that it could make therefrom, does not show an understanding that the work should be done for defendant on the same terms.—STANDARD PRINTING CO. v. DEMOCRAT PUB. CO., Wis., 58 N. W. Rep. 238.

20. CORPORATIONS—Insolvency—Preferences.—If the theory that corporate property is a trust fund for its creditors is invoked to invalidate a conveyance which operates a preference, there is no reason why it should not also operate to prevent complaining creditors from obtaining priority by an attachment.—WALKER v. MILLER, U. S. C. C. of App., 59 Fed. Rep. 869.

21. CORPORATIONS—Receivers—Stockholders.—Where a stockholder of a corporation which is in the hands of a receiver seeks leave to inspect its books, it is no ground for denying him the right that his object is to obtain material to convince the other stockholders that a plan of re organization, which has met the approval of a majority of them, should not be carried out.—CHABLE v. NICARAGUA CANAL CONSTR. CO., U. S. C. C. (N. Y.), 59 Fed. Rep. 846.

22. CORPORATIONS—Stockholders—Enjoining Assessments.—Where a solvent corporation assesses non assessable stock, and demands payment of the assessment, on penalty of a forfeiture and sale of the stock, injunction will lie, at suit of a stockholder.—SAN ANTONIO ST. RY. CO. v. ADAMS, Tex., 25 S. W. Rep. 639.

23. COUNTIES — Liability for Pauper's Coffins.—A county is not liable for coffins of paupers dying in a pesthouse which is in charge of the state, under the quarantine laws.—MCNORTON v. VAL VERDE COUNTY, Tex., 25 S. W. Rep. 653.

24. CREDITORS' BILL—Equity Jurisdiction.—An action in equity will lie, at the suit of judgment creditors, to set aside as fraudulent a chattel mortgage given by the debtor, and judgments entered on judgment notes given by him, and execution levies under such judgments.—SWEETSER v. SILBER, Wis., 58 N. W. Rep. 239.

25. CRIMINAL EVIDENCE—Confidential Communications.—An attorney will not be permitted to disclose confidential communications made to him by a client while the relation of attorney and client continues. But communications voluntarily made to him after the confidential relation has terminated may be proved, although they are the same, in substance, as given while the relation existed.—BRADY v. STATE, Neb., 58 N. W. Rep. 161.

26. CRIMINAL LAW—Carrying Weapons.—Carrying a pistol on a public road situated on premises where the defendant lives does not violate the statute prohibiting carrying weapons.—BALL v. STATE, Tex., 25 S. W. Rep. 627.

27. CRIMINAL LAW—New Trial—Misconduct of Jury.—The fact that on a trial for murder, after the evidence had gone to the jury, two jurors read a newspaper which contained an accurate synopsis of the evidence, and also correctly stated that "defendant was not placed on the stand," is not ground for a new trial.—WILLIAMS v. STATE, Tex., 25 S. W. Rep. 629.

28. CRIMINAL LAW—Remarks of Counsel.—A conviction will not be set aside because of improper remarks of counsel, unless they were so material as to injuriously affect defendant's rights, and unless defendant is refused an instruction directing the jury to disregard them.—MILLER v. STATE, Tex., 25 S. W. Rep. 634.

29. CRIMINAL LAW—Swindling.—On an indictment for swindling R, thereby obtaining from him a horse, the fact that R was induced to bet his horse on his ability to open a knife does not prevent the transaction from being a swindle.—GRAY v. STATE, Tex., 25 S. W. Rep. 627.

30. CRIMINAL LAW — Theft — Conversion by Bailee.—Pen. Code, art. 742*a*, declares that any person having possession of personal property of another under a contract of bailment, who shall, without consent of the owner, fraudulently convert such property to his own use, shall be guilty of theft: Held, that the fact that a bank, by mistake, paid defendant $500 more than his check called for, which he converted to his own use, did not justify a conviction under this article.—FULCHER v. STATE, Tex., 25 S. W. Rep. 625.

31. CRIMINAL LAW—Witness—Refreshing Memory.—Where a witness is impeached, his declarations, made soon after the transaction, to a third person, may be stated by himself, and afterwards shown by such person, in order to corroborate him.—STATE v. STATON, N. Car., 19 S. E. Rep. 96.

32. DEATH BY WRONGFUL ACT—Limitations.—Under a State statute which requires the action to be brought within two years from the death (Rev. St. Ind. § 284), and which, as interpreted by the State courts, does not merely revive the right of action for the injury, but rather gives a new cause of action unknown to the common law, the existence of the right of action cannot be made to depend (by analogy to the common-law rule in cases of murder, appeals of death and inquisitions against deodands) upon the dying of the injured person within a year and a day from the date of the injury.—LOUISVILLE, E. & ST. L. R. CO. v. CLARKE, U. S. S. C., 14 S. C. Rep. 579.

33. DEEDS — Acknowledgment. — A conveyance by husband and wife of land to which the wife has no separate title, if properly acknowledged by the husband, conveys his title, though the deed is not acknowledged by the wife.—JACK v. DILLON, Tex., 25 S. W. Rep. 645.

34. DEED—Contingent Remainder.—When one conveys land to his son for life, the remainder in fee-simple to belong to the son's children, the remainder is contingent until the son has children, and the title thereto remains in the grantor, and passes on his death to his heirs, the son not having in the meantime had children.—COOTS v. YEWELL, Ky., 25 S. W. Rep. 597.

35. DEEDS—Description—Boundaries.—A plat of land owned by plaintiff's grantor, represented the distance thereof, from north to south, to be 1,117 feet, and dedicated a street bisecting the land from east to west and an alley bounding the land on the south. Thereafter he conveyed to plaintiffs lots bounded on the south by the alley, and on the north by the street, having a depth of 506 feet, as represented by the plat: Held that, though the land owned by the grantor was 1,157, instead of 1,117, feet from north to south, as shown by the plat, plaintiffs, having the number of feet their deeds called for, were not entitled to half of the sur-

plus 40 feet, and to move the south line of the street 20 feet north.—WILLIAMS v. CITY OF ST. LOUIS, Mo., 25 S. W. Rep. 561.

36. DEEDS—Life Estate.—A deed to A, "and after his death to the issue of his body," creates only a life estate for A, and after his death a life estate for his issue. —BRADFORD v. GRIFFIN, S. Car., 19 S. E. Rep. 76.

37. DEED—Unlocated Certificate.—A conveyance of an unlocated land certificate does not vest in the grantee the legal title of land afterwards located thereunder and patented to the grantor, but only gives him an equitable title, to be enforced by a suit within 10 years.—KANKIN v. BUSBY, Tex., 25 S. W. Rep. 679.

38. DEED OR WILL.—A writing reciting that, whereas R desires to make a distribution of his estate, to take effect after his death, the said R aliens, sells, and conveys land unto certain nephews; that the conveyance is to be recorded, but not to take effect so as to give possession until after his death, and that said R stipulates that at his death whatever personal property remains is to be divided between the nephews named,—is a deed of the land, as the recital not to take effect until after his death refers to the possession.—RAWLINGS v. MCROBERTS, Ky., 25 S. W. Rep. 601.

39. DRAINAGE — Exceptions to Commissioner's Report.—Where a drainage commissioner's report stated that a contractor had completed an open ditch "according to the plans and specifications adopted and approved by the court," a finding by the court "that such open ditch, as constructed, has been completed by the contractor," is insufficient to authorize a conclusion of law that the commissioner is entitled to a judgment approving his report, since such finding does not show that the work has been done according to the plans and specifications, or according to the order.—RACER v. WINGATE, Ind., 36 N. E. Rep. 538.

40. ELECTIONS — Rejecting Qualified Electors.—The fact that qualified voters were erroneously, but in good faith, prevented from voting at an election by the inspectors thereof, will not defeat the election, and the person receiving a plurality of the votes actually cast was elected.—STATE v. HANSON, Wis., 58 N. W. Rep. 237.

41. EMINENT DOMAIN— Res Judicata.— An order authorizing a railroad company to take possession of land under proceeding in eminent domain was conclusive of all matters relied on by the owner for a recovery of the land at the time such order was issued.—MUHLE v. NEW YORK, T. & M. RY. CO., Tex., 25 S. W. Rep. 607.

42. EQUITY—Bill of Revivor.—In a suit by stockholders of a railroad company against certain county officers to enjoin the collection of taxes on the property of the company, which had given a mortgage thereon, neither the mortgagee nor any representative of the mortgagee was made a party: Held, that a new corporation, deriving title under foreclosure of such mortgage, did not occupy such a relation to the plaintiffs as would entitle it to file a bill of revivor; and, such foreclosure, and the deeds under it, having conveyed all the interests of the defendants in the foreclosure suit, no title which would sustain a revivor was acquired by such corporation under a foreclosure of a subsequent mortgage which was treated by the parties as an abandoned security.—KEOKUK & W. R. CO. v. COUNTY COURT OF SCOTLAND COUNTY, U. S. S. C., 14 S. C. Rep. 605.

43. EQUITY—Mistake in Contract—Correction.—A contract providing for the payment of $26 per month on 13 shares in a building and loan association, "as provided for in the by-laws of the association," which are made a part of the contract, furnishes the evidence of a mutual mistake,—the by-laws providing only for a payment of $1 per month on each share,—which may be corrected.—ABBOTT v. INTERNATIONAL BLDG. & LOAN ASS'N, Tex., 25 S. W. Rep. 620.

44. EQUITY—Rescission of Deed. — No fraud in obtaining a deed of a right of way can be implied from the fact that the railroad ran two lines across plaintiff's land, one of which would have seriously inconvenienced him, wherefore he gave them a deed of a right of way on the other.—GUESS v. SOUTH BOUND RY. CO., S. Car., 19 S. E. Rep. 68.

45. EVIDENCE—Parol Evidence—Contract.—A written order given to plaintiff's agent to "please ship" a certain article, for which "we agree to pay" a fixed price, named therein, is not necessarily a contract; and, when there is no evidence that such order was ever received and acted upon by the plaintiff, parol evidence is admissible to prove that the article was delivered to defendants under a verbal agreement that it should be taken on thirty days' trial, and returned to plaintiff by defendants if it failed to give entire satisfaction; and, under a proper pleading, parol evidence is admissible to prove that the order, and an acceptance to a certain sight draft, were obtained by false and fraudulent representations.—NATIONAL CASH REGISTER CO. v. PFISTER, S. Dak., 58 N. W. Rep. 270.

46. EVIDENCE — Statement of Witness on Former Trial.—Where a witness is shown to be absent from the State, his testimony given at a former trial of the cause is admissible in evidence, if otherwise unobjectionable.—OMAHA ST. RY. CO. v. ELKINS, Neb., 58 N. W. Rep. 164.

47. EVIDENCE OF PARTNERSHIP — Declarations.—The court erred in admitting evidence of the declarations of the defendant's husband, made to the plaintiff when the defendant was not present, to the effect that the defendant was, or had agreed to become, a copartner of the plaintiff in the business in lieu of the defendant's husband.—VIRGIN v. DUNWODY, Ga., 19 S. E. Rep. 84.

48. FEDERAL COURTS—Supreme Court—Jurisdiction. —A decision by a State Supreme Court that a wife who abandons her husband for a paramour, and afterwards takes advantage of a decree of divorce procured by the former to solemnize a marriage with the latter, is thereby estopped from subsequently claiming property as the heir of her husband, although the decree of divorce was in fact void for want of service, involves no federal question, and is not reviewable in the Supreme Court of the United States, on the theory that it amounted to an attainder, *ex post facto* law, or a taking of property without due process of law.—ISRAEL v. ARTHUR, U. S. S. C., 14 S. C. Rep. 583.

49. FEDERAL COURTS—Supreme Court—Writ of Error. —A decision of the Supreme Court of a State that the State is estopped by its acts and conduct to assert title in itself to certain lands under the swamp-land act of September 28, 1850, as against claimants thereof under a subsequent grant by congress, involves no federal question.—STATE v. FLINT & P. M. R. CO., U. S. S. C., 14 S. C. Rep. 586.

50. FEDERAL COURTS—Supreme Court—Writ of Error to State Court.—After the amendment of 1890 to the constitution of Missouri, providing for the separation of the Supreme Court of the State into two divisions for the transaction of business, and for the transfer o any cause involving a federal question to the full court for decision, a conviction for a murder, committed before such amendment, was affirmed by one division of the court, and an application to it for a rehearing was denied, no reference to any federal question being made. Thereafter defendant moved for a transfer to the full court, on the ground that the amendment, as applied to an offense committed before its adoption, violated the constitution of the United States: Held, that the constitutional right was not specially set up or claimed at such time, and in such way as to give jurisdiction to the Supreme Court of the United States to review a denial of the motion.—DUNCAN v. STATE, U. S. S. C., 14 S. C. Rep. 570.

51. FEDERAL JUDGMENTS — Collateral Attack.—The fact that the record in a Federal Court fails to affirmatively show federal jurisdiction does not make its judgment a nullity, or render it subject to collateral attack;

and this is true when the court assumes jurisdiction because it holds that the suit involves the construction of an act of congress, even if it is mistaken in so holding.—DOWELL V. APPLEGATE, U. S. S. C., 14 S. C. Rep. 611.

52. FIXTURES — Rights of Assignee for Creditors.—Casks in a brewery which are nine feet high and seven feet in diameter, so large as not to be removable from the building without making a hole in the floor, and used in the process of manufacturing beer, are fixtures, and pass under a mortgage of the land, together with all improvements and "all machinery used in and for the brewery" established thereon.—MEYER V. ORYNSKI, Tex., 25 S. W. Rep. 655.

53. FRAUDULENT CONVEYANCES — Evidence.—Where defendant sold a part of his property openly, and removed the balance without any attempt at concealment, the mere fact that he afterwards pretended, when called on by creditors, that he had nothing with which to satisfy their demands, does not show that the sale was fraudulent.—FORTNER V. BROWNELL, Wis., 58 N. W. Rep. 253.

54. FRAUDULENT CONVEYANCES—Rights of Creditors.—A judgment creditor who has obtained a lien by levy of execution on his debtor's property has the right, independently of Rev. St. § 3186, to maintain an equitable action to set aside fraudulent claims of third persons on the property.—ROZEK V. REDZINSKI, Wis., 58 N. W. Rep. 262.

55. GIFT OF LAND—Possession and Improvement.—A parol gift of land, followed by an entry thereon by the donee, who makes valuable improvements on the faith of the gift, is valid.—SAMUELSON V. BRIDGES, Tex., 25 S. W. Rep. 636.

56. HOMESTEAD — Abandonments.—Two things must concur, to show an abandonment of a homestead, viz., an intention to abandon, and actual abandonment.—EDWARDS V. REID, Neb., 58 N. W. Rep. 202.

57. INSURANCE — Agent's Authority. — An insurance agent who is authorized to contract for risks, to countersign and deliver policies in the name of the company, and to receive and collect premiums may exercise his powers through an assistent, who thereby becomes an agent of the company.—HARTFORD FIRE INS. CO. V. JOSEY, Tex., 25 S. W. Rep. 685.

58. INTOXICATING LIQUORS—Evidence.— Where, in a prosecution for selling liquor in violation of the local option law, it is shown that the various petitions to the county commissioners' court, asking that an election be held in the county to prohibit the sale of intoxicating liquors therein, are lost, oral evidence of their contents is admissible.— IRISH V. STATE, Tex., 25 S. W. Rep. 633.

59. JUDGMENT— Default—Opening —Fraud. — Where his warrantor, who has agreed to defend the possessor's title, and is a party defendant in the suit, is told by plaintiff's attorney that the suit has been settled and dismissed, and that he may go home, and so informs the possessor, and they do nothing further to make a defense, such possessor can set aside the default then entered, on proof that the attorney knew the warrantor's relations with him, and that his statement actually caused their default. He need not show that the attorney made the statement fraudulently, knowing it to be false.—RODRIGUEZ V. ESPINOSA, Tex., 25 S. W. Rep. 669.

60. JUSTICE COURTS—Jurisdiction.—Any objection in a justice court to the sufficiency of the declaration constitutes a general demurrer, and gives the court jurisdiction, and any defects in the return of the officer to summons is thereby waived.—STEVENS V. HARRIS, Mich., 58 N. W. Rep. 230.

61. LANDLORD AND TENANT — Unlawful Detainer.—The vendee of a leasehold term cannot maintain an action of unlawful detainer in the Indian Territory, under Mansf Dig. Ark. § 3348, to recover possession from his vendor, who refuses to surrender the premises at the time agreed.—MCCAULEY V. HAZLEWOOD, U. S. C. C. of App., 59 Fed. Rep. 877.

62. LIBEL.—Publishing one's name in a list of "dead beats and delinquents," for circulation among business men, is libelous *per se*.—NETTLES V. SOMERVELL, Tex., 25 S. W. Rep. 658.

63. LIMITATIONS—Possession under Fraudulent Deed.—The statute of limitations does not run in favor of a person in possession of land under a deed made to defraud creditors of the grantor, as against such creditors, until the discovery by them of the facts constituting the fraud.—GARVIN V. GARVIN, S. Car., 19 S. E. Rep. 79.

64. LIMITATIONS OF ACTIONS— Vacant Lands — Payment of Taxes.—Under the Colorado statute which declares that any person paying taxes on vacant lands under color of title made in good faith, for five successive years, shall be deemed the legal owner, according to the purport of his paper title (Gen. St. 1883, § 2187), no possession whatever is necessary, and the court has no power to read into the statute a condition to that effect.—THATCHER V. GOTTLIEB, U. S. C. C. of App., 59 Fed. Rep. 872.

65. MARRIAGE—Cohabitation of Emancipated Slaves.—Where slaves had cohabited with the consent of their master, their voluntary agreement to live together as husband and wife, and their cohabitation after emancipation, consttiuted a legal marriage from the time the subsequent living together commenced.—CUMBY V. GARLAND, Tex., 25 S. W. Rep. 673.

66. MASTER AND SERVANT—Danger Premises.—Where plaintiff was sent on the roof of a building to make repairs, and the roof, which was of sheet iron, had corroded by the ashes and dirt from defendant's furnace which it had negligently allowed to accumulate on the roof, and broke under plaintiff, who was ignorant of its condition, he is entitled to recover.—ENGSTROM V. ASHLAND IRON & STEEL CO., Wis., 58 N. W. Rep 240.

67. MASTER AND SERVANT — Fellow-servants. — A superintendent of a mine, who has entire charge of the work, hires and discharges the men, keeps their time, controls their work and is the only representative of the owner at that place, is a vice-principal.—CHICAGO ANDERSON PRESSED-BRICH CO. V. SOBKOWIAK, Ill., 36 N. E. Rep. 572.

68. MASTER AND SERVANT—Negligence.—A master is only bound to use ordinary care in furnishing his employees with safe machinery and appliances.—GULF, C. & S. F. RY. CO. V. MCNEILL, Tex., 25 S. W. Rep. 647.

69. MASTER AND SERVANT—Negligence.—In determining whether a particular act was done in the course of a servant's employment, the question is, was it committed by the authority of the master, expressly conferred, or fairly implied from the nature of the employment, and the duties incident to it? And, in determining the question of authority, we are to regard the object, purpose, and the end of the employment.—THEISEN V. PORTER, Minn., 58 N. W. Rep. 265.

70. MASTER AND SERVANT—Risks of Employment.—A complaint alleging that defendant city, in constructing a bridge, carelessly erected a bent, placing the base on blocks and chips, without any nailing or bracing of any sort; that plaintiff, an employee of defendant, was not present when it was erected, and knew nothing of its condition; that thereafter he was ordered by defendant's street commissioner to go to the bent, and remove timbers near it; and that his foot slipped, and he put his hand against the bent for support, whereupon it fell and crushed him,—states a cause of action.—CITY OF LEBANON V. MCCOY, Ind., 36 N. E. Rep. 547.

71. MORTGAGE — Foreclosure. — A bill to foreclose a trust deed securing notes maturing at different times was filed after only part of the notes had matured. The bill alleged that the trust deed provided that, on default on any of the notes, the whole sum should become due, at the option of the legal holders; that the

whole of said sum had become due by reason of non-payment of the first of said notes; and that the holders of said overdue notes had requested the trustee, as provided in the trust deed, to foreclose it: Held, that the bill sufficiently alleged that the note holders had elected to declare the whole debt due.—HEFFRON v. GAGE, Ill., 36 N. E. Rep. 569.

72. MORTGAGES— Foreclosure — Redemption.—After foreclosure of a senior mortgage, and sale and conveyance to enforce the same, a junior mortgagee cannot foreclose his mortgage without first redeeming from the sale, though he was not a party to the first foreclosure.—ROSE v. JAMES, Ill., 36 N. E. Rep. 555.

73. MORTGAGES— Priority—Notice.—Though the probate of a mortgage merely recites that the mortgagee "procured the same to be proved by this court," and fails to state that it was acknowledged by the grantor, or its execution proved by the witness thereto, it will be presumed that the probate was properly taken.—QUINNERLY v. QUINNERLY, N. Car., 19 S. E. Rep. 99.

74. MUNICIPAL CORPORATION — Defective Streets.—A city is liable for injuries to a horse caused by glass negligently left on the street over which he is being driven.—CITY OF EL PASO v. DOLAN, Tex., 25 S. W. Rep. 669.

75. MUNICIPAL CORPORATIONS—Penal Ordinance of.—Where the charter of a city authorizes it "to locate and regulate variety theatres," and "to prevent the sale of any intoxicating liquors" therein, an ordinance is valid, declaring it a penal offense for one connected with a variety theater to sell intoxicating liquors, though such defense is not defined in the Penal Code.—AYERS v. CITY OF DALLAS, Tex., 25 S. W. Rep. 631.

76. MUNICIPAL CORPORATIONS—Repeal of Ordinance.—Where a municipal ordinance provides that a former ordinance "is hereby amended so as to read as follows," any provisions of the former ordinance and found in the later one are repealed.—ASHLAND WATER CO. v. ASHLAND COUNTY, Wis., 58 N. W. Rep. 235.

77. MUNICIPAL CORPORATION—Sidewalks.—Act March 30, 1887, §§ 1, 2, providing that a city having a special charter, and less than 10,000 inhabitants, may construct sidewalks, and the expense shall constitute a lien on the adjacent property which the city may enforce against such property, and section 6, repealing inconsistent acts, repealed Act March 14, 1859, § 11, providing that the city may collect the expense by an action in debt.—CITY OF PLEASANT HILL v. DASHER, Mo., 25 S. W. Rep. 566.

78. MUNICIPAL CORPORATIONS — Special Tax Bills.—In enforcing special tax bills authorized by the charter of Kansas City of 1875, which, in article 8, § 4, p. 75, provides that any such tax bill may be collected by suit in any court of competent jurisdiction, and, in case any owner of the ground is a non-resident, by order or notice published, the Circuit Court is in the exercise of its general jurisdiction, and judgments in such cases are not open to collateral attack.—CHARLEY v. KELLEY, Mo., 25 S. W. Rep. 571.

79. MUNICIPAL OFFICERS—Custodian.—The committee having charge of the combined court house and city hall building in the city of St. Paul, under the provisions of Sess. Laws, 1889, ch. 64, § 6, and authorized to appoint a janitor, a custodian, and such other employees as may be deemed necessary, has no power to appoint any of these employees for a period of time extending beyond the year for which the appointive members of said committee are themselves appointed.—EAGAN v. CITY OF ST. PAUL, Minn., 58 N. W. Rep. 268.

80. NATIONAL BANKS — Powers of Managing Officer.—The vice president and general executive officer of a national bank has no power to borrow so large a sum as $200,000 at four months' time for the bank in the absence of special authority from the board of directors, and persons dealing with him are presumed to know the extent of his powers in this regard. — WESTERN NAT. BANK OF NEW YORK v. ARMSTRONG, U. S. S. C., 14 S. C. Rep. 572.

81. NAVIGABLE WATERS — Right to Take Oysters — Prescription.—The exclusive right to take oysters in a navigable bay cannot be acquired by prescription. — JONES v. JOHNSON, Tex., 25 S. W. Rep. 650.

82. NEGLIGENCE—Evidence.—In an action for injuries, the attending physician may testify as to the probable result of the injuries upon plaintiff's health and life.—BARR v. CITY OF KANSAS, Mo., 25 S. W. Rep. 562.

83. NEGLIGENCE—Obstruction of Street.—In an action for injuries caused by the piling of iron pillars by defendant in front of his premises, with which plaintiff's wagon collided, an instruction to find for defendant, if, at the time of plaintiff's injury, "and for weeks or months and for an unreasonable time prior thereto," defendant used the street for storing iron pillars, with one of which plaintiff's wagon collided, without negligence on his part, is erroneous.—GERDES v. CHRISTOPHER & SIMPSON ARCHTECTURAL IRON & FOUNDRY CO., Mo., 25 S. W. Rep. 557.

84. NEGOTIABLE INSTRUMENTS—Action by Indorsee.—It seems that in an action by an indorsee of a promissory note against the holder, where the defendant pleads fraud in the inception of the note, the burden is upon the plaintiff to show that he is a *bona fide* holder for value, but that, where the defense pleaded if failure of consideration, the burden is upon the defendant to show that the plaintiff did not pay value for the note, or that he took it with notice. — VIOLET v. ROSE, Neb., 58 N. W. Rep. 216.

85. NEGOTIABLE INSTRUMENTS—Bona Fide Purchasers.—In an action on a "patent-right" note by an indorsee thereof, newspaper accounts of the arrest of one of the payees for swindling persons by selling patent rights which had expired are admissible to show plaintiff's notice of fraud in procuring the note, when other evidence tends to show that plaintiff read the accounts, and knew that the swindling transaction for which the arrest was made was a part of the payee's regular business, in the course of which the note in suit was taken.—STATE NAT. BANK OF SPRINGFIELD v. BENNETT, Ind., 36 N. E. Rep. 551.

86. NEGOTIABLE INSTRUMENT—Parties—Liability.—To render an indorser of a note liable as maker, he must have indorsed it before or at the time of delivery to the payee. — JOHNSON v. MCDONALD, S. Car., 19 S. E. Rep. 65.

87. NEGOTIABLE INSTRUMENTS—What Constitutes.—A certain instrument made in the State of Kansas contained a promise to pay to K or order, five years after date, a sum certain, with interest at 8 per cent., payable semi annually, as per annexed coupons; both principal and interest payable at K's bank, in Topeka. It recited that both "this note" and the coupons were to be construed by the laws of Kansas in every particular, and were secured by a mortgage on land, and provided that they should draw 12 per cent. interest after maturity; that in default of payment of any coupon the principal should become due, and the amount of such defaulted coupon should be added to the principal, and the whole bear interest at 12 per cent.: Held, that this was a negotiable instrument. — DE HASS v. ROBERTS, U. S. C. C. (Penn.), 59 Fed. Rep. 853.

88. OFFICER—Estoppel of Deputy to Claim Office.—One who accepts the office of deputy treasurer from the treasurer is estopped, while retaining the deputyship, to deny the latter's title to the office of treasurer.—WARDEN v. BAYFIELD COUNTY, Wis., 58 N. W. Rep. 248.

89. ORDER—Verbal Acceptance. — One who verbally accepts an order in favor of a third person for the payment of money due the maker of the order is liable thereon to the payee.—WHITE v. DIENGER, Tex., 25 S. W. Rep. 666.

90. PARTNERSHIP—Actions.—An action on an account due a firm is properly brought in the names of its members, though the firm has been dissolved.—HYDE v. MOXIE NERVE-FOOD CO., Mass., 36 N. E. Rep. 585.

91. PARTNERSHIP—Dissolution.—The mere fact that a member of a copartnership firm retires therefrom does

not release from the obligations of its contract a corporation which had theretofore engaged to furnish electric lights for the use of an hotel of which, first, the aforesaid firm, and, later, its successor, a member of said firm, was proprietor; there being no showing of a release of either member of said firm from its contract liabilities, nor that, under said contract, duties were incumbent on said firm implying a special personal confidence in the member retiring therefrom.—SWOBE V. NEW OMAHA THOMPSON-HOUSTON ELECTRIC LIGHT CO., Neb., 58 N. W. Rep. 181.

92. PHYSICIANS—Compensation.—A person serving as a physician without having a certificate of qualification, as required by Rev. St. art. 3625 *et seq.*, cannot recover for such services.—KENNEDY V. SCHULTZ, Tex., 25 S. W. Rep. 667.

93. PHYSICIAN—Pleading—Qualification.—A complaint in an action for services as physician is sufficient, as against an objection to evidence, though it does not allege that plaintiff received a diploma from some medical college, or was a member of a State or county medical society, as provided by Rev. St. § 1436.—RIDER V. ASHLAND COUNTY, Wis., 58 N. W. Rep. 236.

94. PLEADING—Suit by Foreign Administrator. — An objection that plaintiff, foreign administrator, has no capacity to sue, if apparent on the petition, is waived by failure to raise it by demurrer. — GREGORY V. MCCORMICK, Mo., 25 S. W. Rep. 565.

95. PRACTICE— Examination of Paper.—The refusal of a motion to require a witness to deliver to plaintiffs for examination, "with the view of introducing it in evidence," a letter used by him to refresh his memory, is harmless, when the letter is not material.—GARNETT V. KELLOGG, Tex., 25 S. W. Rep. 680.

96. PRINCIPAL AND AGENT—Confidential Relations.—Where an agent for investment conveyed to his principal, in satisfaction of a balance due her, land of less value than such balance, without informing her of its value, she being ignorant thereof, the fact that he afterwards accounted to her for the rents of the property for several years does not preclude her from disaffirming the transaction.—BOYD V. JACOBS, Tex., 25 S. W. Rep. 681.

97. RAILROAD COMPANIES—Accidents at Crossings.—The obligations of railroad companies and of travelers crossing their tracks are mutualand reciprocal, and an instruction is erroneous which requires "ordinary" care of the traveler, and "a high degree of care" of the company.—ATCHISON, T. & S. F. R. CO. V. MCCLURG, U. S. C. C. of App., 59 Fed. Rep. 860.

98. RAILROAD COMPANIES — Damages from Fires. — Under Gen. St. § 1511, holding railroad companies responsible for injuries by fire originating within their right of way through the act of their "authorized agents," a complaint alleging that defendant, through "its agent," set fire on its right of way, which communicated to plaintiff's property, causing the injuries complained of, is good.— MAYO V. SPARTANBURG, U. & C. R. CO., S. Car., 19 S. E. Rep. 73.

99. RAILROAD COMPANIES — Negligence—Fencing. — Where a railroad company neglects to fence its track outside the corporate limits of a village or to put in a cattle guard where the track crosses such limits, as required by statute, it is responsible for an accident caused by the presence of cattle on the track outside of such limits, although the cattle first went upon the track inside the village.—ATCHISON, T. & S. F. R. CO. V. ELDER, Ill., 36 N. E. Rep. 565.

100. RAILWAY AND TELEGRAPH COMPANIES—Governmental Aid.—There was nothing in the acts of July 1, 1862, and July 2, 1864, which would prevent the Union Pacific Railroad Company, in the discharge of its obligation to maintain a telegraph line for railroad and commercial purposes, from contracting with a telegraph company for the joint maintenance of a line of poles on the railroad right of way, upon which each party was to string its wires; the railroad company to maintain its own telegraphic offices and operators, adequate to the transmission of commercial, as well as railroad, messages. — UNION PAC. RY. CO. V. UNITED STATES, U. S. C. C. of App., 59 Fed. Rep. 813.

101. RECEIVERS— Accounting. — A receiver of partnership property, appointed in a suit to dissolve the partnership, is entitled to credit for interest paid by him on a firm debt secured by mortgage on the property.—HEFFRON V. RICE, Ill., 36 N. E. Rep. 562.

102. RECEIVERS — Carriers — Damages. — Act Cong. March 3, 1887, permitting suit against a receiver, without leave of the appointing court, for any act of his in carrying on the business connected with the property in his charge, applies to a passenger's action for bodily injuries caused by non-repair of a station platform.—FULLERTON V. FORDYCE, Mo., 25 S. W. Rep. 587.

103. RES JUDICATA—Judgments.—The application of the doctrine of *res judicata* is in no wise affected by the fact that the amount in controversy in the former suit was so small as to prevent the defeated party from securing a review of the judgment by an appellate court. —JOHNSON STEEL STREET RAIL CO. V. WILLIAM WHARTON, JR., & CO., U. S. S. C., 14 S. C. Rep. 608.

104. SALE—Construction of Contract.—A manufacturer shipped goods to a merchant under an agreement appointing the merchant his agent to sell such goods, the latter to pay freight, taxes, and expenses, make good any loss by fire and guaranty all notes received on time sales. The merchant was also to arrange the credits, was to remit cash daily, and notes once a month, and at any time after 12 months from date of shipment was to give his own note for balance of consignment unpaid, if so required by the manufacturer, "but nothing herein shall be construed as amounting to a positive sale without said requirement:" Held, that the transaction was not a sale.—LENZ V. HARRISON, Ill., 36 N. E. Rep. 567.

105. SALE—Rescission of Contract.—Where the purchaser of goods to be delivered from time to time, and paid for each month, fails to pay for the goods delivered, the seller may rescind the contract, and sue for the value of the goods delivered.—GEORGE H. HESS CO. V. DAWSON, Ill., 36 N. E. Rep. 557.

106. SALE — Warranty. — When a manufacturer, by formal written contract, warrants merely the construction and finish of the article ordered according to the specifications, he does not warrant the article to be fit for the use intended.—MILWAUKEE BOILER CO. V. DUNCAN, Wis., 58 N. W. Rep. 233.

107. STATUTES—Subjects and Titles.—Act April 8, 1889, entitled "An act to amend an act to regulate the condemnation of property for water mains, is unconstitutional in so far as it authorizes the condemnation of land for reservoirs for water-works.—ADAMS V. SAN ANGELO WATER-WORKS CO., Tex., 25 S. W. Rep. 605.

108. TAXATION—Exemptions—Church Property.—The exemption, by section 2, art. 1, ch. 77, Comp. St. of "property which may be exclusively for religious purposes" does not extend to property owned by a religious society separate and distinct from that on which is situated its church edifice; the mere intention in the future to erect such an edifice on said property not so occupied, and the accumulation of the present rents arising therefrom for that purpose, not being sufficient to bring the property within the purview of the statute referred to.—FIRST CHRISTIAN CHURCH OF BEATRICE V. CITY OF BEATRICE, Neb., 57 N. W. Rep. 166.

109. TAXATION — Investments of Non-resident.—A non resident who sends money into this State, and surrenders its possession and control to agents fully authorized to loan, invest, and manage the same, thereby subjects such property to the jurisdiction of this State for the purposes of taxation; and the legal fiction that the *situs* of such property is at the domicile of the owner yields to the requirements of justice, and the actual *situs* is the place where the property is actually situated and employed in business, and where such agents reside.—BILLINGHURST V. SPINK CO., S. Dak., 58 N. W. Rep. 272.

110. TAXATION OF RAILROADS—Exemptions.—An elevator built by a railroad company at a place where there was no elevator, and where none would have been built by private capital, and used exclusively for receiving and transferring grain shipped over the company's road, is property "necessarily" used in operating a railroad, within Rev. St. § 1038, exempting such property from general taxation.—CHICAGO, ST. P. M. & O. RY. CO. v. BAYFIELD COUNTY, Wis., 58 N. W. Rep. 245.

111. TELEGRAPH COMPANIES—Damages.—Actual damages may be recovered for injury to the feelings proximately caused by a telegraph company's unreasonable delay in delivering a message, without physical injury. —WESTERN UNION TEL. CO. v. NEEL, Tex., 25 S. W. Rep. 661.

112. TELEGRAPH COMPANIES — Mistake—Damages.— Where the incorrect transmission of a telegram caused plaintiff to sell shares of stock for which he received the market value, his damages are limited to the cost of the message, though a few days later he was compelled, in order to buy shares of the same stock, to pay an advanced price.—HUGHES v. WESTERN UNION TEL. CO., N. Car., 19 S. E. Rep. 100.

113. TELEGRAPH COMPANY—Special Damages.—Damages caused by neglect to deliver a telegram, resulting in plaintiff's loss of a fee, are remote and special, and, unless specially alleged in the complaint, cannot be recovered.—MOOD v. WESTERN UNION TEL. CO., S. Car., 19 S. E. Rep. 67.

114. TRESPASS TO TRY TITLE—Joinder of Causes and Parties.—In trespass to try title against a railroad company, where defendant prays condemnation of the land, and alleges that third persons gave it bonds conditioned to secure land for it, such persons cannot be joined as defendants, and judgment rendered against them for the value of the land.—FREY v. FT. WORTH & R. G. RY. CO., Tex., 25 S. W. Rep. 609.

115. TRUST—Resulting Trust—Evidence.—Evidence of the grantor in a deed of trust that the purchaser at the sale under the deed purchased it for him, and of the purchaser to the same effect, is sufficient to sustain a finding that the purchaser held title in trust for such grantor.—MORRISON v. HERRINGTON, Mo., 25 S. W. Rep. 568.

116. USURY AS DEFENSE — Accommodation Paper.— An answer averring that the note sued on was made by defendants for accommodation of the payees, who discounted it with plaintiffs at an illegal rate of interest, states a good defense under the New York law, without averring that plaintiff knew it to be accommodation paper at the time of taking it.—RODECKER v. LITTAUER, U. S. C. C. of App., 59 Fed. Rep 857.

117. VENDOR AND PURCHASER—Incumbrance by Easement.—A grantee of land which is incumbered by a right of way or other easement takes it burdened with such incumbrance, and will not, as a rule, be entitled to recover damage therefor.—CHICAGO, R. I. & P. RY. CO. v. SHEPHERD, Neb., 58 N. W. Rep. 189

118. VENDOR AND PURCHASER — Option Contract. — A contract witnessed that defendant "agrees to buy and pay cash for certain tracts of timber" which plaintiff "has or may hereafter contract for;" that defendant would, at a certain time, take the timber at a stated advance on the price paid by plaintiff; and that defendant might at once cut and manufacture the timber: Held, that the contract was not a mere option, but established the relation of vendor and vendee, and time was not of the essence thereof. — SITTERDING v. GRIZZARD, N. Car., 19 S. E. Rep. 92.

119. WASTE—Restraining.—An action against one in possession of real estate to restrain alleged commissions of waste thereon was properly dismissed when the court found from the proofs that no waste had been contemplated or committed by either of the defendants.—ST. CLAIR v. SEDGWICK, Neb., 58 N. W. Rep. 185.

120. WATERS—Navigable Waters.—A river upon which logs may be floated during periodical freshets of six weeks' or two months' duration is a "navigable" stream. — FALLS MANUF'G CO. v. OCONTO RIVER IMP. CO., Wis., 58 N. W. Rep. 257.

121. WATERS—Oyster Bed — Establishing of Public Grounds.—The decision of the board fixing the location of the public grounds, where there is no protest or appeal, is final, in the absence of fraud or mistake; and an entry and grant of a natural oyster bed not included in the boundaries fixed by the board cannot be vacated on the ground that such bed was not subject to entry.—STATE v. SPENCER, N. Car., 19 S. E. Rep. 93.

122. WILLS—Construction.—A will giving all testator's property to his wife and children, providing that his wife should have possession and control thereof, and that, if it became necessary to sell property for the purpose of paying debts, certain real estate should be sold last, the whole of the property to remain in the possession of testator's wife during her widowhood, for the support of herself and children, does not make a settlement for the benefit of the wife and children, or put any limitation on the power of the wife to alienate her interest in the land devised to her.—CLUSKY v. BURNS, Mo., 25 S. W. Rep. 585.

123. WILL — Construction.—Testator, having eight children, besides grandchildren by a deceased daughter, divided the residue of his estate into nine parts, and gave two parts absolutely to two sons, and the other seven parts in trust for the other children and grandchildren. The will provided that, if any of the beneficiaries of the trust died without issue, his or her portion should be "equally divided among the others:" Held that, on the death of one of the beneficiaries without issue, the two sons who were given their portions absolutely were entitled to share with the other beneficiaries under the trust.—NILES v. ALMY, Mass., 36 N. E. Rep. 582.

124. WILLS—Devises—Alternative Contingencies.—A devise to trustees for the purpose of division among the children of testator's son (a person in being), if he should have any, and in case he should die "without lawful issue," then to other persons mentioned, is a devise upon an alternative contingency; and even if the first devise is void, as creating a perpetuity, the second will take effect if the son dies without having had any lawful issue.—PERKINS v. FISHER, U. S. C. C. of App., 59 Fed. Rep. 801.

125. WILLS—Division of Land.—Testatrix devised her homestead to her son and daughter, "to be equally divided" between them, the dividing line to be run across the tract so as to give to the son the part on the east, and to the daughter the part on the west: Held, that the parts were to be equal in value, rather than in area.—SANDERSON v. BINGHAM, S. Car., 19 S. E. Rep. 71.

126. WILLS—Proofs of Execution.—The testimony of persons present at the execution of a will is admissible in establishing it, after one of the subscribing witnesses has been examined, as provided by Rev. St. art. 1847.—STEPHENSON v. STEPHENSON, Tex., 25 S. W. Rep. 648.

127. WITNESS—Transactions with Deceased.—On an issue whether defendant was the owner of a note originally a part of the assets of a partnership of which defendant was a member, the court properly refused to allow him to testify that, on dissolution of the firm, the note became his property, his former partner being dead.— LUMPKIN v. MONTGOMERY, Tex., 25 S. W. Rep. 661.

128. WRONGFUL ATTACHMENT BY CORPORATION—Malice.—In an action against a foreign corporation for wrongful attachment, there was evidence that defendant's agent made the affidavit by direction of its general manager in the State; that, after he made the affidavit, he visited the town where plaintiff was doing business, and heard that plaintiff had mortgaged some buggies to a bank; that, after reporting to the manager, the latter directed him to attach; and that the attachment was made partly on such rumors, "but mainly on the fact that we believe that" plaintiff "was not coming up to his contract:" Held, that the evidence supported a finding that the acts complained of were directed by defendant. — EMERSON, TALCOTT & CO. v. SKIDMORE, Tex., 25 S. W. Rep. 671.